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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES
DEPARTMENT OF WATER AND POWER,
Petitioner,

vs.

NATIONAL AUDUBON SOCIETY, a corporation;
FRIENDS OF THE EARTH, a corporation;
THE MONO LAKE COMMITTEE, a corporation;
and the LOS ANGELES AUDUBON SOCIETY, a corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the court below erred in interpreting and applying this Court's decision in *Illinois Central Railway Co. v. State of Illinois*, 146 U.S. 387 (1892), as prohibiting the California legislature from adopting a water rights system under which appropriative water rights affecting navigable waters are acquired free of any "public trust."

2. Whether a state court decision, which changes state law suddenly and unpredictably so as to convert vested property rights in water to revocable licenses to use water subject to its recapture by the State for "public trust" uses, constitutes a deprivation of property without due process in violation of the Fourteenth Amendment of the Federal Constitution.

PARTIES TO THE ACTION

Parties to the state court action were National Audubon Society, a corporation; The Los Angeles Audubon Society, a corporation; The Mono Lake Committee, a corporation; Friends of the Earth, a corporation; Department of Water and Power of the City of Los Angeles; State of California; California State Lands Commission; California Water Resources Control Board; United States of America; Southern California Edison Company, a corporation; June Lake Public Utility District; Lee Vining Public Utility District; and the following individuals: Lenore M. Brown, Dallas O. Burger, Miriam S. Burger, Bruce F. Clark, Corrine J. Clark, Martin Duker, Elsa M. Duker, Sandra L. Jenkins, William C. Jenkins, R. Gary Jones, Elizabeth S. Meteer, Thomas F. Metzger, C. Douglas Off, Theodore Off, Janice O. Simis, Rollin D. Wallace, and Natalie C. Wallace.

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OPINIONS BELOW

The decision of the California Supreme Court is reported at 33 Cal.3d 419, and modified at 33 Cal.3d 726a. The decision and modification are reproduced in the Appendix at pages 1-58. The prior decision and judgment of the lower California court, the Alpine County Superior Court, were not published; they are reproduced in the Appendix at pages 77-82.

JURISDICTION

The California Supreme Court entered its decision on February 17, 1983. A Petition for Reconsideration was filed by the State of California. The California Supreme Court modified its original opinion and denied reconsideration by order entered April 14, 1983. A petition for certiorari was, therefore, due July 13, 1983, but upon application of petitioner granted June 27, 1983, by Associate Justice Rehnquist, the time for filing the petition was extended to August 22, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3) and Rule 17.1 of this Court.

STATUTORY PROVISIONS INVOLVED

This case involves the extent to which the Fourteenth Amendment to the United States Constitution protects vested water rights acquired under Article X, Section 2, of the California Constitution and the California Water Code (relevant portions of which are reproduced in the Appendix at pages 83-92) against novel applications of the judicially created public trust doctrine.

STATEMENT OF THE CASE

The California Supreme Court decision abruptly took from petitioner City of Los Angeles the permanence and certainty of its state-granted, vested, appropriative water

rights in the Mono Lake Basin and subjected them to the recurring threat of reduction or revocation without compensation by engrafting onto them limitations imported from the public trust doctrine. The state court's ruling similarly threatens all rights in California to divert and use water from navigable sources or their non-navigable tributaries.

Since 1914, acquisition and administration of appropriative water rights in California have been governed by a comprehensive statutory scheme codified in the state Water Code and buttressed by a 1928 amendment to the State Constitution. App. 83. Under this scheme, appropriative rights to surface water are acquired by application to the State Water Resources Control Board (hereinafter "Water Board"). If a permit is granted and the water is diverted and used reasonably and beneficially as authorized by the permit, the appropriative right vests as a permanent right revocable only for failure to comply with the conditions stated in the permit or for failure to continue making reasonable and beneficial use of the water. Los Angeles' water rights which are the subject of this litigation were acquired and have been used for more than forty years in accordance with this statutory scheme.

Los Angeles' Mono Basin Water Rights

Los Angeles, the second largest city in the United States, is located on a semi-desert coastal plain. Assuring an adequate water supply is a critical need for its over three million residents. Local waters can satisfy only about fifteen percent of the population's water requirements. Therefore, projects have been constructed to import water from distant sources pursuant to appropriative water rights. About seventeen percent of Los Angeles' total sup-

ply is diverted from non-navigable streams which are tributary to navigable Mono Lake, hundreds of miles north of Los Angeles.

Mono Lake is the terminus of a hydrologic basin with no outlet to the sea. Under natural conditions, all water from precipitation, surface runoff and springs within the basin (an annual average of approximately 170,000 acre feet) flows into the lake and evaporates. The lake's surface elevation and size remain relatively constant when the average annual evaporation equals the average annual inflow.

In its natural state Mono Lake has become more than twice as salty as the ocean due to thousands of years of evaporation and consequent concentration of salts in the remaining water. No fish can survive in its waters; the only living things in the lake are brine flies and brine shrimp, and various forms of algae upon which they feed. The brine shrimp and brine flies in turn provide food for both the migratory birds that stop at the lake and for the birds that nest there. Chief among the nesting birds is the California Gull, a common species that inhabits the coastal waters but breeds inland at sites such as Mono Lake and the Great Salt Lake.

Los Angeles first proposed diverting water from the Mono Basin in the 1920's, when it became evident that its other water sources would need augmentation. In 1934 Los Angeles filed two water right applications with the Water Board for permits to appropriate the waters of Walker, Rush, Parker, and Lee Vining Creeks, four of the principal tributaries to Mono Lake, for municipal use and hydroelectric power generation. In the middle of the Great Depression of the 1930's, the people of Los Angeles voted their approval of $38 million in bonds to extend its existing

aqueduct system northerly into the Mono Basin to gather water from these creeks.

The proposed Mono Basin diversions were given significant protection by the United States. In 1931 Congress withdrew all public lands in the Mono Basin from entry or disposal "for the purpose of protecting the water sheds now or hereafter supplying water to the City of Los Angeles. . . ." Act of March 4, 1931, P.L. 864, 46 Stat. 1530. This safeguard was reinforced by a second Act of Congress granting the City the right to purchase Federal lands in Mono County for any necessary purpose of the City. Act of June 23, 1936, P.L. 759, 49 Stat. 1892.

In 1940, after conducting investigations and hearings, the Water Board approved Los Angeles' water right applications and granted permits thereon. In 1941 Los Angeles completed construction of the facilities necessary to bring the water to the City. These facilities included diversion works, conduits, Grant Dam and Reservoir, and an eleven-mile tunnel to the City's existing aqueduct in Owens Valley.

During the 1960's, to meet its constantly increasing need for water, Los Angeles constructed a second aqueduct from the Owens Valley-Mono Basin area. The second aqueduct and related hydroelectric generating facilities, costing about $143 million, were put into use in June 1970, and diversions from the Mono Basin pursuant to Los Angeles' water right permits were then increased from an annual average of about 70,000 acre feet to an average of about 100,000 acre feet per year.

In 1974 Los Angeles submitted proof to the Water Board that it was making full beneficial use of the water diverted under its permits. The Water Board then issued Licenses Nos. 10191 and 10192 confirming that the City's Mono Basin

appropriative water rights had become perfected and vested by use. App. 93-104.

From the time the City's Mono Basin diversions were first proposed in the 1920's, it has been known that by decreasing inflow to Mono Lake such diversions would gradually reduce the level and size of the lake until a new balance was reached between the decreased inflow and the decreased evaporation from the lake's reduced surface area.[1] As a result of Los Angeles' diversions, lake levels have lowered an average of about a foot a year since 1940. The lake is expected to stabilize eventually at about two-thirds its present size with a surface area of 38 square miles.

The Challenge to Los Angeles' Water Rights

In 1979 respondents National Audubon Society and a number of associated organizations and individuals (hereinafter "Audubon") sued Los Angeles to enjoin the Mono Basin diversions. *National Audubon Society, et al. v. Department of Water and Power of the City of Los Angeles*, Alpine County Superior Court No. 566. Audubon did not allege that Los Angeles had violated the terms of its permits or licenses or that its diversions or uses of water thereunder were unreasonable or non-beneficial. Instead, the action was based primarily on the theory that a public trust protects the water of Mono Lake for fish, wildlife, recreation, navigation and other in-source uses against alleged adverse effects of the lowering of the lake level caused by Los Angeles' diversions for out-of-source uses.

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[1]Because of this expected decline in the level of the lake, in the 1930's Los Angeles spent over $5 million to acquire the lands and littoral water rights of private owners who would be affected.

Audubon contended, in particular, that continued reduction in the lake's size will increase salinity to the point that the brine shrimp and brine flies can no longer survive, that the availability of safe nesting sites for the California Gull will be drastically reduced, that exposed lakeshore alkali dust will impair air quality, that navigation of small recreational craft will be rendered more hazardous, that local climate and scenic values will be adversely impacted, and that the opportunities for scientific research will be curtailed. These feared consequences are sharply disputed by some scientific studies.

Los Angeles cross-complained for adjudication of water rights in the Mono Basin, joining as defendants all other basin water users and claimants of water rights, including the United States and the State of California. The United States removed the action to the federal district court for the Eastern District of California. Los Angeles moved to remand the action to the state court because it believed at that time that all the issues were state law issues. The District Court denied the motion for remand but, applying the federal abstention doctrine, stayed the action and directed Audubon to seek resolution in the state courts of two issues which the federal court believed involved only issues of state law, the principal one being:

> What is the interrelationship of the public trust doctrine and the California water rights system in the context of the right of . . . [Los Angeles] to divert water from Mono Lake pursuant to permits and licenses issued under the California water rights system? . . . Stated differently, can the plaintiffs challenge . . . [Los Angeles'] permits and licenses by arguing that those permits are limited by the public trust doctrine, or must the plaintiffs challenge the permits and licenses by arguing that the water diversions and uses authorized thereunder are not "reasonable or bene-

ficial" as required by the California water rights system?

App. 61.

In obedience to the District Court's order, Audubon filed this action in the Alpine County Superior Court for a declaratory judgment. On the principal issue, it prayed for a declaration that it could challenge the legality of Los Angeles' diversions on the independent ground of violation of the public trust, without regard to the California water rights system.

The State answered the complaint and then filed a motion for summary judgment contending on the principal issue that, in relying upon the public trust doctrine, Audubon's complaint failed to state a cause of action. The State argued that the legislatively-created appropriative water rights system completely and exclusively defines the circumstances under which water may be diverted for use,[2] and that the public trust doctrine has no independent legal force in such a context.

Los Angeles answered Audubon's complaint, filed a cross-complaint to determine its rights under its water

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[2]The legislative scheme provides that *all* water of the State, unless already being used pursuant to riparian or appropriative rights, is subject to appropriation. Water Code Sec. 1201. An appropriative right is initiated by application to the Water Board, which secures its priority date. Water Code Secs. 1225, 1450, 1455.

The Water Board then decides whether there is unappropriated water and whether an appropriative water right permit should be granted to the applicant. In making this decision, the Water Board is required to take into account the public interest in stream maintenance, fish and wildlife protection and other environmental concerns. Water Code Secs. 1243, 1243.5. Members of the public have the right to protest applications based on public interest considerations. Water Code Sec. 1330, 23 Cal. Admin. Code Sec. 719. The Water Board has the discretion to condition or even reject an application when in its judgment the public interest so warrants. Water Code Secs. 1255, 1257.

right permits and licenses, and supported the State's motion for summary judgment.

Audubon opposed the State's summary judgment motion and filed its own cross-motion for summary judgment as prayed for in its complaint.

The Alpine County Superior Court awarded summary judgment in favor of the State and Los Angeles, holding on the principal issue that:

> The plaintiffs have failed to state a cause of action. The California water rights system is a comprehensive and exclusive system for determining the legality of the diversions of the City of Los Angeles in the Mono Basin . . . The Public Trust Doctrine does not function independently of that system. This Court concludes that as regards the right of the City of Los Angeles to divert waters in the Mono Basin that the Public Trust Doctrine is subsumed in the water rights system of the state.

App. 77.

Audubon sought and was granted immediate review of the Superior Court's judgment by the California Supreme Court, which then reversed the judgment. On the principal issue, it held for the first time that perfected appropriative water rights in California are subject to repeated reconsideration, and to reduction or revocation without compensation if a new look persuades the Water Board or a court that the authorized diversions should be curtailed because they adversely affect public trust uses of navigable waters:

> [T]he public trust imposes a duty of continuing supervision over the taking and use of the appropriated water . . . [T]he state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

App. 41.

Based on this radical new interpretation of the public trust, the California court concluded that Audubon "can rely on the public trust doctrine in seeking reconsideration of the allocation [to Los Angeles] of the waters of the Mono Basin." App. 51.

How the Federal Questions Were Raised and Decided

In its decision, the California Supreme Court considered and decided the two related federal questions on which this petition is based.

First, applying the public trust doctrine enunciated by this Court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), it judicially repealed the right, under California's statutory scheme, to obtain permanent vested rights to divert and use water from navigable streams. In so doing, it ignored this Court's later ruling in *Appleby v. City of New York*, 271 U.S. 364 (1926), that *Illinois Central* was only a statement of Illinois state law, *Id.* at 393-95, and elevated it to a position of paramount federal law.[3]

The California Supreme Court thereby created a new kind of higher law, based on a United States Supreme Court precedent, which prevails over contrary state law. In so doing, it converted a question of State law—the relationship between the public trust doctrine and the California

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[3]Respondents opposing this petition may argue that, in light of the *Appleby* decision, the California Supreme Court did not apply federal law, but only interpreted a state common law doctrine. But it could not have reached the result it did by applying only state common law. California law, Civil Code Sec. 22.2, incorporates only so much of the common law "as is not repugnant to or inconsistent with" the State Constitution and statutes, which are the expression of "the supreme power" of the State. Civil Code Sec. 22.1. Thus, the state statutes which created the appropriative right system and authorized grants of fully vested property rights in water diversions could not have been overridden by the state's common law. Only paramount federal law could have accomplished that result.

water rights system—into a federal question—whether the California court correctly interpreted and applied a decision of this Court as overriding the State's statutory water rights law.[4]

Second, the California Supreme Court held that this new rule subjecting Los Angeles' perfected appropriative water rights to reconsideration and reduction in order to reallocate the water for public trust uses does not constitute a taking of property without compensation in violation of due process guarantees of the federal Constitution.[5]

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[4]This determination of federal issues is set forth in the decision at App. 24-30. See also the quotations from the California Court's opinion *infra* at 18-19.

[5]That it considered and ruled on this federal constitutional question is apparent from the following excerpts from its opinion:

> . . . [A]ccording to DWP [the City of Los Angeles Department of Water and Power], the recipient of a [Water] board license enjoys *a vested right* in perpetuity to take water without concern for the consequences to the trust. (Emphasis addded.)

App. 38.

> [T]he state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state . . . . applies to the water tributary to Mono Lake and *bars DWP or any other party from claiming a vested right* to divert waters once it becomes clear that such diversions harm the interests protected by the public trust. (Emphasis added.)

App. 4.

> In *State of California v. Superior Court (Fogerty), supra,* 29 Cal.3d 240, 249, we stated that owners of shoreline property in Lake Tahoe would be entitled to compensation if enforcement of the public trust required them to remove improvements. By implication, however, *the determination that the property was subject to the trust,* despite its implication as to future uses and improvements, *was not considered a taking requiring compensation.* (Emphasis added.)

App. 29.

> It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basis. *No vested rights bar such reconsideration.* (Emphasis added.)

App. 43.

The Special Importance of this Case

The importance of stable and secure water supplies in the water-scarce western United States is almost axiomatic. Decisions of both this Court and the California Supreme Court have recognized that certainty of water rights is essential to proper planning and efficient use of the resource. *Arizona v. California*, ... U.S. ....., 103 S.Ct. 1382, 1392 (1983); *People v. Shirokow*, 26 Cal.3d 301, 310 (1980); *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 354-56 (1979).

Because of this need for certainty, California and the other western states have developed comprehensive statutory systems to confer assured water rights, by providing that competing water demands and public interest considerations be balanced *before* the right is conferred. Hutchins, *Water Rights Laws in the Nineteen Western States*, 312-13, 320, 323-42 (1971). The result of these state enactments has been a universal understanding and expectation that the appropriative water rights thus obtained are permanent and incontestable. That expectation was shattered by the California Supreme Court's decision in this case.

The impact of this decision will be widespread and profound. Since appropriative water rights affecting navigable waters are the common foundation for much of the municipal and agricultural water supplies in this state, the decision deeply affects not only Los Angeles and its over three million inhabitants, but also millions of other Californians.

We are unable to catalog exhaustively the California cities which rely for their municipal supplies on water rights which would be subject to curtailment under the Cal-

ifornia Supreme Court's decision. Even a quick survey, however, shows them to include every major metropolitan area of the State—Los Angeles, San Diego, Sacramento and the San Francisco Bay Area (including the cities of San Francisco, San Jose, and Oakland).

Two huge water development systems upon which much of California's irrigated agriculture depends have also been built in reliance on state-granted appropriative water rights now subject to partial or total cancellation under the California Supreme Court's decision. The federal Central Valley Project appropriates from the navigable Trinity, Sacramento, American, and San Joaquin Rivers and Sacramento-San Joaquin Delta to sustain the irrigation of millions of acres of farmland in the agriculturally rich Sacramento and San Joaquin Valleys. California's State Water Project, in addition to supplying municipal needs in both the San Francisco Bay Area and southern California, provides irrigation water for large acreages of farmland in the San Joaquin Valley by appropriations from the navigable Feather River and Sacramento-San Joaquin Delta.[6] Local public water districts in California have also built many smaller storage projects on navigable streams or their tributaries to provide water for irrigation based on similar appropriative water rights.

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[6]The Sacramento-San Joaquin Delta, from which both the state and federal projects divert water, has long been the center of the state's fiercest political and environmental water battles. *See, e.g., Westlands Water Dist. v. United States*, 700 F.2d 561 (9th Cir. 1983); *United States v. California*, 694 F.2d 1171 (9th Cir. 1982); *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979), *rev'd* 451 U.S. 287 (1981); *United States v. California*, 529 F.Supp. 303 (E.D. Cal., 1981). The state court's public trust decision, by providing endless *de novo* consideration and reconsideration of the appropriative rights involved, has insured that the thorny issues will never be finally settled.

Billions of dollars have been invested in these projects. Repayment of this public investment depends upon the delivery and sale of the water supplies for which they were constructed, which in turn depend upon the security and reliability of their water rights.

Western power supplies are also heavily dependent on appropriative water rights. Major power producers, both public and private, rely on water stored in mountain reservoirs which affect navigable waters to provide significant portions of the power they sell. For example, Los Angeles' Mono Basin water rights at issue here produce hydroelectric energy equivalent to about half a million barrels, or about twenty million dollars' worth, of fossil fuel annually. Enormous reliance, both financial and practical, has been placed on hydroelectric power supplies, and thus on the stability of the water rights upon which they are based. Loss of these supplies means increased dependence on fossil fuels with higher power rates and increased air pollution.

In addition to the severe potential financial impact of the California court's decision, all diverters affected by the court's decision will face the problem of obtaining replacement water for the water which they may be prevented from diverting. For example, Los Angeles already faces possible cutbacks of other water supplies. The State Water Project, the only readily available alternate source, has contractual commitments which exceed its present supply and itself may face public trust challenges to its diversions.

Finally, the California Supreme Court's decision has ramifications beyond this state. The same conflict between proponents of in-source water use and those who rely on state-granted out-of-source diversion rights is repeated throughout the western states. If the *Illinois Central* doc-

trine prohibits state grants of permanent vested water rights to divert from navigable streams, or if state courts may suddenly destroy the vested nature of such water rights, then water supplies of all other western states, which rely on the prior appropriation doctrine, have also been severely undermined. Among the water projects in those states are many federal reclamation, flood control, and water supply projects, founded on appropriative water rights, which the United States has constructed at the cost of billions of dollars.

The tremendous economic, human and environmental impacts of the California Supreme Court's startling decision warrant issuance by this Court of a writ of certiorari to review the federal questions raised by the decision.

ARGUMENT

I

PRIOR TO THE CALIFORNIA SUPREME COURT'S DECISION IN THIS CASE, ALL RELEVANT PRECEDENT HELD THAT PERFECTED APPROPRIATIVE WATER RIGHTS WERE VESTED PERMANENT PROPERTY RIGHTS IN CALIFORNIA AND OTHER WESTERN STATES

A basic characteristic of appropriative water rights is that, once perfected by use, they become vested, permanent, property rights immune from reduction or termination as long as the water continues to be diverted and used reasonably and beneficially as authorized by the appropriative permit and license. This characteristic has been acknowledged by informed commentators, established by the California statutory scheme governing appropriation of water, and declared by court decisions in California and throughout the semi-arid western states.

One of the early texts on western water law stated:

> . . . while the title of the public or the state to the unappropriated waters of the stream can only be devested as to the portion thereof segregated and appropriated to beneficial uses, when this has been legally done the appropriator becomes the proprietor of the water appropriated and diverted, or of the use thereof, which is the same thing; and *so long as the beneficial use is continued the water remains the subject of exclusive ownership and control and is the property of the appropriator in every legal aspect.* (Emphasis added.)

3 Farnham, *The Law of Waters and Water Rights,* 2090 (1904). *See also* 2 Kinney, *Irrigation and Water Rights,* 1313-14 (2d. ed. 1912).

More recently, Wells A. Hutchins, one of the leading authorities on western water law, described appropriative water rights under California law as follows:

> The first appropriator of water from a particular watercourse in point of time has the prior exclusive right to the use of the water to the extent of his appropriation, without material diminution in quantity or deterioration in quality, whenever the water is available. Each later appropriator has a like priority with respect to all those who are later in time than himself. *The appropriative right relates to a specific quantity of water, and is good as long as the right continues to be exercised.* (Emphasis added.)

Hutchins, *The California Law of Water Rights,* 40 (1956).

The California constitutional and statutory code sections reproduced in the Appendix, App. 83-92, establish the principles quoted above. They expressly encourage the fullest possible use of the waters of the State for reasonable and beneficial purposes and assure permanency of appropriative water rights.

To carry out this program, California's appropriation statutes establish a two step process. First, a prospective appropriator is granted a conditional right (a permit) which allows one to construct the necessary storage and diversion works and begin using the water. Second, a final right (a license) is issued when the appropriator proves he has put the water to full beneficial use. A water right permit is effective as long as the appropriator complies with its stated conditions and diligently works to place the water to beneficial use. Water Code Sec. 1390. Upon completion of the necessary physical structures and proof of beneficial use of the water in accordance with the permit, the permittee is entitled to the license confirming his vested right to appropriate. Water Code Secs. 1600, 1610.

Even during the permit stage, the Water Board's authority to further condition or limit the right granted is limited. But it terminates completely upon issuance of the license. Water Code Sec. 1394. A permit or a license may be revoked only for failure to comply with the stated conditions or failure to apply the water to reasonable beneficial use, Water Code Secs. 1240, 1611, 1627, and in any event only upon adverse determination following notice and hearing. Water Code Secs. 1241, 1410, 1675.

Nowhere in these sections or anywhere else in California constitutional or statutory law is there any authority, express or implied, to limit or terminate licensed appropriative rights on the ground that their continued exercise impacts public trust uses.

Before the California Supreme Court decision in this case, California court decisions have been uniform in acknowledging that appropriative water rights are property rights and permanent, absent a failure to use the water

reasonably and beneficially as authorized by the permit or license. The following are examples of such decisions:

> Under the law of this state as established at the beginning, the water-right which a person gains by diversion from a stream for a beneficial use is a private right, a right subject to ownership and disposition by him, as in the case of other private property. All the decisions recognize it as such. Many of them refer to it in terms which can have no other meaning than that the right is private property.

Thayer v. California Development Co., 164 Cal. 117, 125 (1912).

> Until East Bay's appropriative rights were created by permit, the water remained unappropriated. (Wat. Code, §§ 1202, 1253, 1375.) Only upon issue of permits did the appropriative rights come into existence. *The latter conferred permanent use and storage rights, subject only to divestiture by the state for failure to comply with conditions of law or of the permits.* (Wat. Code, §§ 1390, 1391, 1410-1415.) (Emphasis added.)

County of Amador v. The State Board of Equalization, 240 Cal.App.2d 205, 213 (1966). *See also Mt. Shasta Power Corp. v. McArthur*, 109 Cal.App. 171, 192 (1930) *aff'd* 9 Cal.2d 751 (1937).[7]

The decision of the California Supreme Court in this case is the only one we are aware of in California or any other western state holding that after an appropriative right has been perfected by use and confirmed by license, it may later be revoked by the State based on a determination that its exercise adversely affects public trust values.

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[7]Other western states' decisions are in full accord. *See, e.g., Navajo Development Co., Inc. v. Sanderson*, 655 P.2d 1374 (Colo., 1982); *Hughes v. Lincoln Land Co.*, 27 F.Supp. 972, 973-974 (D. Wyo. 1939).

II

THE CALIFORNIA SUPREME COURT ERRED IN APPLYING THIS COURT'S DECISION IN ILLINOIS CENTRAL RAILROAD CO. V. STATE OF ILLINOIS AS DEPRIVING CALIFORNIA'S LEGISLATURE OF POWER TO GRANT VESTED, PERMANENT APPROPRIATIVE WATER RIGHTS

Given California's explicit statutory and judicial rule that appropriative water rights are permanent, vested property rights, the California Supreme Court was forced to search for a new doctrinal basis to support its ruling that water rights affecting navigable water constitute only nonvested permissions which may be revoked to promote public trust uses. It fastened on the public trust doctrine enunciated by this Court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), and expansively and erroneously applied that doctrine to override the state's statutory water rights law and take back vested water rights granted pursuant to its comprehensive statutory plan of resource management.

The portion of the California Supreme Court decision headed *"Duties and powers of the state as trustee"* contains the clearest statement of the basis for its ruling. It stated first:

> [T]he decision of the United States Supreme Court in *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, remains the primary authority even today, almost nine decades after it was decided.

App. 24.

It continued by stating that it "indorsed the *Illinois Central* principles" when it decided a case entitled *People v. California Fish Co.*, 166 Cal. 576 (1913), App. 26, and applied "the principles of *Illinois Central*" to uphold certain leases

in *Boone v. Kingsbury*, 206 Cal. 148 (1928). App. 27. It then concluded that the *Illinois Central* doctrine required the state to retain power to administer the public trust, "a power which extends to the revocation of previously granted rights or the enforcement of the trust against lands long though free of the trust." App. 29.

Illinois Central and the California cases applying its principles prior to the present case dealt solely with title to land. In the present case, the California Supreme Court extended the principles to water rights, with the result that perfected appropriative rights to divert from the source, long held to be vested property rights, can be reduced or revoked without compensation in favor of public trust uses at the source.

In *Illinois Central*, the Illinois Legislature in 1869 granted the railroad a one-mile wide strip of submerged land in Lake Michigan running along almost the entire Chicago waterfront. The operative language of the act stated that the lands were "hereby granted *in fee* to the said Illinois Central Railroad Company." (Emphasis added.) 146 U.S. at 448. The Court pointed out that the act gave the railroad total control of the development of one of America's most important ports:

> The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor. . . . A corporation created for one purpose, the construction and operation of a railroad between designated points, is by the act converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally.

146 U.S. at 450-51.

In 1873, the Illinois Legislature repealed the 1869 Act and reasserted title to this submerged land. Litigation resulted to test the revocability of a grant in fee by a state to a private corporation. In a stinging rejection of the 1869 act, this Court said:

> A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. . . . So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state.

146 U.S. at 453-54.

What is striking about the *Illinois Central* decision is the lack of any citation of authority for the proposition just quoted. Thus, it seems to be based on a concept of *natural law* which limits state legislative power. Nothing in the Illinois or the United States Constitutions prohibited the Illinois Legislature (which after all, was the body elected by the people of the state to act on their behalf) from deeding this land to a private party in fee. Yet this Court held that this simply could not be done.

Many commentators have analyzed the *Illinois Central* decision, the most prominent being Professor Joseph Sax in his 1970 law review article, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471. As Professor Sax opines, the true doctrinal basis for the opinion seems to be outrage; the act of the Illinois Legislature granting the submerged land in fee was "particularly egregious." 68 Mich. L. Rev. at 490. Professor Sax goes on to note:

> But *Illinois Central* also raises more far-reaching issues. For example, what are the implications for the workings of the democratic process when such programs, although ultimately found to be unjustifiable, are nonetheless promulgated through democratic institutions? Furthermore, what does the existence of those seeming imperfections in the democratic process imply about the role of the courts, which, *Illinois Central* notwithstanding, are generally reluctant to hold invalid the acts of the co-equal branches of government.[8]

Id. at 491.

The implications of *Illinois Central* referred to by Professor Sax were startling when it was decided in 1892. But the implications of the California court's extension of *Illinois Central* in the present case to appropriative water rights, coupled with its enlargement of the uses protected

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[8]These kinds of problems prompted this Court, in 1926, to limit *Illinois Central* by declaring it to have been simply an exposition of Illinois state law. *Appleby v. City of New York*, 271 U.S. 364. The California Supreme Court ignored *Appleby*, for to do otherwise would have left it with no basis for reducing California's statutory grants of vested water rights to historical footnotes. In order to elevate a common law public trust doctrine to a position of superiority over explicit statutorily created rights, the *Illinois Central* doctrine had to be rehabilitated as a prohibition of state legislative action.

by the public trust, are even more startling. At the time of *Illinois Central*, the protected uses were understood to be limited to navigation, commerce and fishing. In recent years they have been substantially expanded to include "preservation of the lands in their natural state" and the maintenance of conditions "which favorably affect the scenery and climate of the area." *Marks v. Whitney*, 6 Cal.3d 251, 259-60 (1971).

In this case the result deprives the largest city in California and the second largest in the nation of the permanent rights it has relied upon to serve seventeen percent of the domestic, commercial and industrial water needs of its people. But the rationale of the decision is applicable not only to other appropriative rights affecting navigable waters in California, but westwide throughout the states that have adopted the appropriation system of water rights. For as we have noted, the California court chose not to ground its decision on an interpretation of California's water rights statutes. Instead, in the face of the authorization by those statutes of permanent, vested appropriative rights, it held that the *Illinois Central* doctrine requires the state to retain continuing jurisdiction to revoke them without compensation in order to protect the public trust.

Justice White stated in April of this year when considering the allocation of Colorado River water rights:

> Abraham Lincoln once described with scorn those who sat in the basements of courthouses combing property records to upset established titles. Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered . . . [Citations omitted.] Certainty of rights is particularly important with respect to water rights in the Western United States. . . . The doctrine of prior appropriation, the prevailing law in the western

> states, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

Arizona v. California, ... U.S. ....., 103 S.Ct. 1382, 1392 (1983).

This is essentially what the California Supreme Court did. It went to the basement, dusted off this Court's nineteenth century *Illinois Central* decision, and expanded it to apply to appropriative water rights. In so doing, it destroyed the reliability of both public and private water supplies.

This Court should review the correctness of this novel interpretation and expansion of the *Illinois Central* decision, and clarify whether the doctrine of that case was meant to proscribe state legislative action creating vested property rights to diversions affecting navigable waters.

III

THE CALIFORNIA SUPREME COURT DECISION UNCONSTITUTIONALLY DEPRIVES LOS ANGELES OF VESTED WATER RIGHTS WITHOUT COMPENSATION

Whether this Court agrees with our analysis that the California court's public trust conclusions rested on *Illinois Central* as paramount federal law (*supra* at 9-10, 18-19), or decides that those conclusions may have rested solely on an interpretation of state law, the decision raises a federal question which should be addressed by this Court: Whether Los Angeles has been unconstitutionally deprived of vested water rights without compensation.

The Fourteenth Amendment prohibits courts, no less than other branches of government, from taking property without due process of law. *Chicago B&Q RR. Co. v. City*

of Chicago, 166 U.S. 226 (1897). While states, through their courts, have authority to enunciate state law which defines what is property, they may not retroactively define it out of existence and thus avoid the responsibility of paying compensation for taking it. In his strongly worded concurring opinion in *Hughes v. State of Washington*, 389 U.S. 290, 294-98 (1967), Justice Stewart admonished state courts as to the limits of their constitutional powers.

Hughes involved a decision of the Washington Supreme Court which for the first time interpreted that state's constitution, adopted some eighty years earlier, as having terminated the littoral rights, including the right to accretions, of riparian landowners along the Pacific Ocean. The majority of this Court preserved the riparians' rights to accretions while avoiding the Fourteenth Amendment constitutional issue by holding that federal law, rather than state law, controlled.

In his concurrence, however, Justice Stewart directly confronted the constitutional issue raised by the Washington court's decision. Deference to a state court's pronouncements on property rights is inappropriate, he declared, where such pronouncements constitute "a sudden change in state law, unpredictable in terms of the relevant precedents." 389 U.S. at 296. Such cases may constitute an unconstitutional deprivation of property, against which this Court stands ready to defend the state court litigant:

> [A] State cannot be permitted to defeat the constitutional prohibition against taking of property by the simple device of asserting retroactively that the property it has taken has never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. [citation omitted.]

389 U.S. at 296-97.

This case presents just such a federal question, for that is precisely what the California Supreme Court did. Because it felt that someone "ought to reconsider" the state's grant of Los Angeles' Mono Basin diversion rights, App. 43, it retroactively defined out of existence the vested, permanent nature of California appropriative water rights and authorized the state's reallocation of such rights to public purposes without the necessity of just compensation. This remarkable about-face in California water rights law was executed for the express purpose, as the California court candidly admitted, *"to clear away the legal barriers* which have so far prevented either the Water Board or the courts from taking a new and objective look at the water resources of the Mono Basin." (Emphasis added.) App. 51. In its zeal to secure reconsideration and reallocation of established water rights, however, one of the "legal barriers" the California Supreme Court removed was the federal Constitution's guarantee of due process of law.

The test for determining when a state court property determination has crossed the line from definition of property to deprivation of property has been variously articulated: whether the state court's decision was "startling," "sudden," or "unpredictable in terms of the relevant precedents," *Hughes v. State of Washington*, 389 U.S. 290, 296, 297 (1967), concurring opinion of Justice Stewart; whether it "rests upon a fair or substantial basis," *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944); whether it so departs from established principles as to be without substantial basis, *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 543 (1929); whether it presents a "novel view," inconsistent with earlier state court decisions, *Fox River Paper Co. v.*

Railroad Comm. of Wisc., 274 U.S 651, 656 (1927); and whether it "is so certainly unfounded that it may properly be regarded as essentially arbitrary." *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1916).

Under any of these formulations, the California Supreme Court's unique decision in this case meets the criteria for unconstitutional deprivation of property.[9] In subjecting all appropriative water rights affecting navigable waters to perpetual uncertainty, the decision stands alone. It is not only directly contrary to legislative policy promoting certainty in water rights, Water Code Sec. 109, and the historic judicial recognition of perfected appropriative rights in California as permanent, vested property rights; it is also inconsistent with the California Supreme Court's own recent decisions castigating uncertainty as "pernicious" because it frustrates the full utilization of water resources mandated by the State Constitution, *In Re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 355-57 (1978), and hampers effective water rights administration. *People v. Shirokow*, 26 Cal.3d 301, 310 (1980).

The decision is unprecedented and arbitrary, leaving both public and private rights in limbo, deprived of any predictable standards of protection and vulnerable to repeated "reallocation" according to the shifting judicial and political whims of the day.

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[9]This is not a case in which a municipality seeks to overturn a *legislative* act of the state on due process grounds. This Court has held that municipalities have no due process protection against acts of the *state legislature* which has the power to create and abolish them. *City of Trenton v. New Jersey*, 262 U.S. 182 (1923). *State courts*, by contrast, have no such creative authority over the state's political subdivisions. In this case, Los Angeles seeks to overturn a state court decision and sustain the state's legislative acts.

The California Supreme Court decision in this case thus constitutes a sudden and unforeseeable change in state law which unsettles established rules of property law, defeats universally held expectations of inviolability, and expropriates valuable property rights for public purposes. Justice Stewart's conclusion in *Hughes* could have been written about the California Supreme Court in this case:

> Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. . . . [T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate. . . .

Hughes v. State of Washington, 389 U.S. at 298.

IV

THE CALIFORNIA SUPREME COURT'S DECISION IS RIPE FOR REVIEW AT THIS TIME

Respondents opposing this petition may contend that review of the state court's decision at this time is premature, arguing that no reduction of Los Angeles' diversions has yet been ordered and that the decision does not itself operate as a taking to deprive Los Angeles of any water. Such

an argument misses the point. The California Supreme Court's decision as it now stands operates, without any need for further proceedings, to transmute Los Angeles' previously secure title into a defeasible title, its permanent easement to divert into a mere revocable license. This divestment of Los Angeles' title is, itself, a taking of property. *See State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *see also Wood v. Lovett*, 313 U.S. 362 (1941); *Appleby v. Delaney*, 271 U.S. 403 (1926); *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (1978). Quantification of the damage caused by the loss of indefeasibility is not needed to demonstrate the deprivation.[10]

The California Supreme Court's decision should be reviewed without delay. The ultimate judgment in this case concerning the amount of reduction of Los Angeles' permitted diversions will not and cannot affect the impact of the decision as *stare decisis* nor recapture the indefeasibility of Los Angeles' water rights which it has destroyed. Postponement of review will only continue the unwarranted vitality and precedential value of the state court's decision. The issues will not be developed further in the course of the action; they are now as sharply focused as they ever will be. Under the circumstances, immediate review is imperative. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975), and cases cited therein.

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[10]For example, the loss of the shield of *res judicata*, and thus the potential reduction of previously vested water rights, was considered by this Court to be sufficient to warrant immediate review in the recent case of *Nevada v. United States*, U.S. , 103 S.Ct. 2906 (1983), even though no actual reduction of water rights had yet been ordered. (*Id.* at 2910.)

CONCLUSION

The California Supreme Court has drastically and erroneously extended public trust principles announced by this Court more than ninety years ago. If allowed to stand, this expansive new interpretation will divest Los Angeles of the permanence and certainty of its valuable vested diversion rights needed to serve its people. Further, it will establish a precedent for the divestment of countless other appropriative rights in California and throughout the West, so that they may be devoted to public use without payment of compensation.

Because of the profound impact of this decision, Los Angeles urges that a writ of certiorari issue from this Court to review the federal question which the decision has raised.

Dated: August 22, 1983

Respectfully submitted,

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No. 83-300

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES
DEPARTMENT OF WATER AND POWER,
Petitioner,

vs.

NATIONAL AUDUBON SOCIETY, a corporation;
FRIENDS OF THE EARTH, a corporation;
THE MONO LAKE COMMITTEE, a corporation;
and the LOS ANGELES AUDUBON SOCIETY, a corporation;
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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33 Cal. 3d 419
(February 17, 1983)

[S.F. No. 24368. Feb. 17, 1983.]

NATIONAL AUDUBON SOCIETY et al., Petitioners, v. THE SUPERIOR COURT OF ALPINE COUNTY, Respondent;

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES et al.,

Real Parties in Interest.

OPINION

BROUSSARD, J.—Mono Lake, the second largest lake in California, sits at the base of the Sierra Nevada escarpment near the eastern entrance to Yosemite National Park. The lake is saline; it contains no fish but supports a large population of brine shrimp which feed vast numbers of nesting and migratory birds. Islands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of Northern Phalarope, Wilson's Phalarope, and Eared Grebe. Towers and spires of tufa on the north and south shores are matters of geological interest and a tourist attraction.

Although Mono Lake receives some water from rain and snow on the lake surface, historically most of its supply came from snowmelt in the Sierra Nevada. Five freshwater streams—Mill, Lee Vining, Walker, Parker and Rush Creeks—arise near the crest of the range and carry the annual runoff to the west shore of the lake. In 1940, however, the Division of Water Resources, the predecessor to

the present California Water Resources Board,[1] granted the Department of Water and Power of the City of Los Angeles (hereafter DWP) a permit to appropriate virtually the entire flow of four of the five streams flowing into the lake. DWP promptly constructed facilities to divert about half the flow of these streams into DWP's Owens Valley aqueduct. In 1970 DWP completed a second diversion tunnel, and since that time has taken virtually the entire flow of these streams.

As a result of these diversions, the level of the lake has dropped; the surface area has diminished by one-third; one of the two principal islands in the lake has become a peninsula, exposing the gull rookery there to coyotes and other predators and causing the gulls to abandon the former island. The ultimate effect of continued diversions is a matter of intense dispute, but there seems little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled.[2]

Plaintiffs filed suit in superior court to enjoin the DWP diversions on the theory that the shores, bed and waters of Mono Lake are protected by a public trust. Plaintiffs' suit

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[1]For convenience we shall refer to the state agency with authority to grant appropriative rights as the Water Board or the board, without regard to the various names which this agency has borne since it was first created in 1913.

[2]For discussion of the effect of diversions on the ecology of Mono Lake, see Young, *The Troubled Waters of Mono Lake* (Oct. 1981) National Geographic, at page 504; Jehl, Jr., *Mono Lake: A Vital Way Station for the Wilson's Phalarope* (Oct. 1981) National Geographic, at page 520; Hoff, *The Legal Battle Over Mono Lake* (Jan. 1982) Cal. Law., at page 28; (Cal Dept. Water Resources, Rep. of the Interagency Task Force on Mono Lake (Dec. 1969) (hereafter Task Force Report)).

was transferred to the federal district court, which requested that the state courts determine the relationship between the public trust doctrine and the water rights system, and decide whether plaintiffs must exhaust administrative remedies before the Water Board prior to filing suit. The superior court then entered summary judgments against plaintiffs on both matters, ruling that the public trust doctrine offered no independent basis for challenging the DWP diversions, and that plaintiffs had failed to exhaust administrative remedies. Plaintiffs petitioned us directly for writ of mandate to review that decision; in view of the importance of the issues presented, we issued an alternative writ. (See *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845 [59 Cal.Rptr. 609, 428 P.2d 593].)

This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values (*Marks v. Whitney* (1971) 6 Cal.3d 251 [98 Cal.Rptr. 790, 491 P.2d 374]), the two systems of legal thought have been on a collision course. (Johnson, *Public Trust Protection for Stream Flows and Lake Levels* (1980) 14 U.C. Davis L.Rev. 233.) They meet in a unique and dramatic setting which highlights the clash of values. Mono Lake is a scenic and ecological treasure of national significance, imperiled by continued diversions of water; yet, the need of Los Angeles for water is apparent, its reliance on rights granted by the board evident, the cost of curtailing diversions substantial.

Attempting to integrate the teachings and values of both the public trust and the appropriative water rights system, we have arrived at certain conclusions which we briefly summarize here. In our opinion, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust. The corollary rule which evolved in tideland and lakeshore cases barring conveyance of rights free of the trust except to serve trust purposes cannot, however, apply without modification to flowing waters. The prosperity and habilitability of much of this state requires the diversion of great quantities of water from its streams for purposes unconnected to any navigation, commerce, fishing, recreation, or ecological use relating to the source stream. The state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses. Approval of such diversion without considering public trust values, however, may result in needless destruction of those values. Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.

The water rights enjoyed by DWP were granted, the diversion was commenced, and has continued to the present without any consideration of the impact upon the public trust. An objective study and reconsideration of the water

rights in the Mono Basin is long overdue. The water law of California—which we conceive to be an integration including both the public trust doctrine and the board-administered appropriative rights system—permits such a reconsideration; the values underlying that integration require it.

With regard to the secondary issue of exhaustion of administrative remedies, the powers, experience, and expertise of the Water Board all argue in favor of granting that agency primary jurisdiction. Long-established precedent, however, declares that courts have concurrent jurisdiction in water right controversies. The Legislature, instead of overturning that precedent, has implicitly acknowledged its vitality by providing a procedure under which the courts can refer water rights disputes to the water board as referee. We therefore conclude that the courts may continue to exercise concurrent jurisdiction, but note that in cases where the board's experience or expert knowledge may be useful the courts should not hesitate to seek such aid.

1. *Background and history of the Mono Lake litigation.*

DWP supplies water to the City of Los Angeles. Early in this century, it became clear that the city's anticipated needs would exceed the water available from local sources, and so in 1913 the city constructed an aqueduct to carry water from the Owens River 233 miles over the Antelope-Mojave plateau into the coastal plain and thirsty city.

The city's attempt to acquire rights to water needed by local farmers met with fierce, and at times violent, opposition. (See generally *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 156-157 [161 Cal.Rptr. 172, 604 P.2d

566]; Kahrl, Water and Power: The Conflict Over Los Angeles' Water Supply in the Owens Valley (1982).) But when the "Owens Valley War" was over, virtually all the waters of the Owens River and its tributaries flowed south to Los Angeles. Owens Lake was transformed into an alkali flat.[3]

The city's rapid expansion soon strained this new supply, too, and prompted a search for water from other regions. The Mono Basin was a predictable object of this extension, since it lay within 50 miles of the natural origin of Owens River, and thus could easily be integrated into the existing aqueduct system.

After purchasing the riparian rights incident to Lee Vining, Walker, Parker and Rush Creeks, as well as the riparian rights pertaining to Mono Lake,[4] the city applied to the Water Board in 1940 for permits to appropriate the waters of the four tributaries. At hearings before the board, various interested individuals protested that the city's proposed appropriations would lower the surface level of Mono Lake and thereby impair its commercial, recreational and scenic uses.

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[3]Ironically, among the decisions reviewed in preparing this opinion was one in which Los Angeles was held liable for permitting water to flow into Owens Lake, damaging mineral extraction facilities constructed in reliance on the city taking the entire flow of the Owens River. (*Natural Soda Prod. Co. v. City of L.A.* (1943) 23 Cal.2d 193 [143 P.2d 12].)

[4]Between 1920 and 1934, the city purchased lands riparian to creeks feeding Mono Lake and riparian rights incident to such lands. In 1934, the city brought an eminent domain proceeding for condemnation of the rights of Mono Lake landowners. (*City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460 [52 P.2d 585].)

The board's primary authority to reject that application lay in a 1921 amendment to the Water Commission Act of 1913, which authorized the board to reject an application "when in its judgment the proposed appropriation would not best conserve the public interest." (Stats. 1921, ch. 329, § 1, p. 443, now codified as Wat. Code, § 1255.)[5] The 1921 enactment, however, also "declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water" (*id.*, now codified as Wat. Code, § 1254), and directed the Water Board to be guided by this declaration of policy. Since DWP sought water for domestic use, the board concluded that it had to grant the application notwithstanding the harm to public trust uses of Mono Lake.[6]

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[5]In theory, the board could have rejected the city's application on the ground that the waters of the streams were already being put to beneficial use or that the DWP proposed an unreasonable use of water in violation of article X, section 2 of the California Constitution. It does not appear that the board considered either proposition.

[6]DWP calls our attention to a 1940 decision of the Water Board involving Rock Creek, a tributary of the Owens River, in which the board stated that "the Water Commission Act requires it to protect streams in recreational areas by guarding against depletion below some minimum amount consonant with the general recreational conditions and the character of the stream." (Div. Wat. Resources Dec. 3850 (Apr. 11, 1940), at p. 24.) The decision concluded that the board had insufficient information to decide what conditions, if any, to place upon DWP's application to divert water from Rock Creek for hydroelectric generation.

We do not know why the board was seemingly more willing to limit diversions to protect recreational values for Rock Creek than for the creeks flowing into Mono Lake. (Neither do we know the eventual outcome of the Rock Creek application.) The language of the board's opinions suggests that the crucial distinction was that

The board's decision states that "[i]t is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but *there is apparently nothing that this office can do to prevent it.* The use to which the City proposes to put the water under its Applications . . . is defined by the Water Commission Act as the highest to which water may be applied and to make available unappropriated water for this use the City has, by the condemnation proceedings described above, acquired the littoral and riparian rights on Mono Lake and its tributaries south of Mill Creek. This office therefore has *no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effect that the diversion of water from these streams may have upon the aesthetic and recreational value of the Basin.*" (Div. Wat. Resources Dec. 7053, 7055, 8042 & 8043 (Apr. 11, 1940), at p. 26, italics added.)[7]

By April of 1941, the city had completed the extension of its aqueduct system into the Mono Basin by construction of certain conduits, reservoirs at Grant and Crowley Lakes,

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the application for the Mono Lake streams was for domestic use, the highest use under the Water Code, while the Rock Creek application was for power generation.

[7]Plaintiffs submitted an interrogatory to the present Water Board, inquiring: "Do you contend that the predecessor of the Water Board, at the time it issued the DWP appropriation permit, held the view that, notwithstanding the protests based on environmental concerns, it had no alternative but to issue DWP the permits DWP sought to export water from the Mono Basin?"

The Water Board replied: "The [Water] Board believes that its predecessor did hold the view that, notwithstanding pro'ests based upon loss of land values resulting from diminished recreational opportunity, if unappropriated water is available, it had no alternative but to issue DWP the permits DWP sought in order to export water from the Mono Basin . . . ."

and the Mono Craters Tunnel from the Mono Basin to the Owens River. In the 1950's, the city constructed hydroelectric power plants along the system to generate electricity from the energy of the appropriated water as it flowed downhill into the Owens Valley. Between 1940 and 1970, the city diverted an average of 57,067 acre-feet of water per year from the Mono Basin. The impact of these diversions on Mono Lake was clear and immediate: the lake's surface level receded at an average of 1.1 feet per year.

In June of 1970, the city completed a second aqueduct designed to increase the total flow into the aqueduct by 50 percent.[8] Between 1970 and 1980 the city diverted an average of 99,580 acre-feet per year from the Mono Basin. By October of 1979, the lake had shrunk from its pre-diversion area of 85 square miles to an area of 60.3 square miles. Its surface level had dropped to 6,373 feet above sea level, 43 feet below the prediversion level.[9]

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[8]In 1974 the Water Board confirmed that DWP had perfected its appropriative right by the actual taking and beneficial use of water, and issued two permanent licenses (board licenses Nos. 10191 and 10192) authorizing DWP to divert up to 167,000 acre-feet annually (far more than the average annual flow) from Lee Vining, Walker, Parker and Rush Creeks. The Water Board viewed this action as a ministerial action, based on the 1940 decision, and held no hearings on the matter.

[9]In 1979 the California Department of Water Resources and the United States Department of the Interior undertook a joint study of the Mono Basin. The study recommends that the level of Mono Lake be stabilized at 6,388 feet. To achieve this end it recommended that exports of water from the Mono Basin be reduced from the present average of 100,000 acre-feet annually to a limit of 15,000 acre-feet. (Task Force Report at pp. 36-55.) Legislation was introduced to implement this recommendation, but was not enacted.

No party seriously disputes the facts set forth above. However, the parties hotly dispute the projected effects of future diversions on the lake itself, as well as the indirect effects of past, present and future diversions on the Mono Basin environment.

DWP expects that its future diversions of about 100,000 acre-feet per year will lower the lake's surface level another 43 feet and reduce its surface area by about 22 square miles over the next 80 to 100 years, at which point the lake will gradually approach environmental equilibrium (the point at which inflow from precipitation, groundwater and nondiverted tributaries equals outflow by evaporation and other means). At this point, according to DWP, the lake will stabilize at a level 6,330 feet above the sea's, with a surface area of approximately 38 square miles. Thus, by DWP's own estimates, unabated diversions will ultimately produce a lake that is about 56 percent smaller on the surface and 42 percent shallower than its natural size.

Plaintiffs consider these projections unrealistically optimistic. They allege that, 50 years hence, the lake will be at least 50 feet shallower than it now is, and hold less than 20 percent of its natural volume. Further, plaintiffs fear that "the lake will not stabilize at this level," but "may continue to reduce in size until it is dried up." Moreover, unlike DWP, plaintiffs believe that the lake's gradual recession indirectly causes a host of adverse environmental impacts. Many of these alleged impacts are related to an increase in the lake's salinity, caused by the decrease in its water volume.

As noted above, Mono Lake has no outlets. The lake loses water only by evaporation and seepage. Natural salts do not evaporate with water, but are left behind. Prior to commencement of the DWP diversions, this naturally rising salinity was balanced by a constant and substantial supply of fresh water from the tributaries. Now, however, DWP diverts most of the fresh water inflow. The resultant imbalance between inflow and outflow not only diminishes the lake's size, but also drastically increases its salinity.

Plaintiffs predict that the lake's steadily increasing salinity, if unchecked, will wreck havoc throughout the local food chain. They contend that the lake's algae, and the brine shrimp and brine flies that feed on it, cannot survive the projected salinity increase. To support this assertion, plaintiffs point to a 50 percent reduction in the shrimp hatch for the spring of 1980 and a startling 95 percent reduction for the spring of 1981. These reductions affirm experimental evidence indicating that brine shrimp populations diminish as the salinity of the water surrounding them increases. (See Task Force Report at pp. 20-21.) DWP admits these substantial reductions, but blames them on factors other than salinity.

DWP's diversions also present several threats to the millions of local and migratory birds using the lake. First, since many species of birds feed on the lake's brine shrimp, any reduction in shrimp population allegedly caused by rising salinity endangers a major avian food source. The Task Force Report considered it "unlikely that any of Mono Lake's major bird species . . . will persist at the lake if populations of invertebrates disappear." (Task Force

Report at p. 20.) Second, the increasing salinity makes it more difficult for the birds to maintain osmotic equilibrium with their environment.[10]

The California gull is especially endangered, both by the increase in salinity and by loss of nesting sites. Ninety-five percent of this state's gull population and 25 percent of the total species population nests at the lake. (Task Force Report at p. 21.) Most of the gulls nest on islands in the lake. As the lake recedes, land between the shore and some of the islands has been exposed, offering such predators as the coyote easy access to the gull nests and chicks. In 1979, coyotes reached Negrit Island, once the most popular nesting site, and the number of gull nests at the lake declined sharply. In 1981, 95 percent of the hatched chicks did not survive to maturity. Plaintiffs blame this decline and alarming mortality rate on the predator access created by the land bridges; DWP suggests numerous other causes, such as increased ambient temperatures and human activities, and claims that the joining of some islands with the mainland is offset by the emergence of new islands due to the lake's recession.

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[10]In the face of rising salinity, birds can maintain such equilibrium only by increasing either their secretion of salts or their intake of fresh water. The former option is foreclosed, however, because Mono Lake is already so salty that the birds have reached their limit of salt secretion. Thus, the birds must drink more fresh water to maintain the osmotic equilibrium necessary to their survival. As the Task Force predicts, "[t]he need for more time and energy to obtain fresh water will mean reduced energy and time for other vital activities such as feeding, nesting, etc. Birds attempting to breed at Mono Lake . . . are likely to suffer the most from direct salinity effects, since the adult birds must devote so much time to obtain fresh water that they may not be able to raise young successfully." (Task Force Report, at p. 19.)

Plaintiffs allege that DWP's diversions adversely affect the human species and its activities as well. First, as the lake recedes, it has exposed more than 18,000 acres of lake bed composed of very fine silt which, once dry, easily becomes airborne in winds. This silt contains a high concentration of alkali and other minerals that irritate the mucous membranes and respiratory systems of humans and other animals. (See Task Force Report at p. 22.) While the precise extent of this threat to the public health has yet to be determined, such threat as exists can be expected to increase with the exposure of additional lake bed. DWP, however, claims that its diversions neither affect the air quality in Mono Basin nor present a hazard to human health.

Furthermore, the lake's recission obviously diminishes its value as an economic, recreational, and scenic resource. Of course, there will be less lake to use and enjoy. The declining shrimp hatch depresses a local shrimping industry. The rings of dry lake bed are difficult to traverse on foot, and thus impair human access to the lake, and reduce the lake's substantial scenic value. Mono Lake has long been treasured as a unique scenic, recreational and scientific resource (see, e.g., *City of Los Angeles v. Aitken, supra,* 10 Cal.App.2d 460, 462-463; Task Force Report at pp. 22-24), but continued diversions threaten to turn it into a desert wasteland like the dry bed of Owens Lake.

To abate this destruction, plaintiffs filed suit for injunctive and declaratory relief in the Superior Court for Mono County on May 21, 1979.[11] DWP moved to change venue.

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[11]DWP contended that plaintiffs lack standing to sue to enjoin violations of the public trust, citing *Antioch v. Williams Irr. Dist.* (1922) 188 Cal. 451 [205 P. 688] and *Miller & Lux v. Enterprise etc. Co.* (1904) 142 Cal. 208 [75 P. 770], both of which held that

When the court granted the motion and transferred the case to Alpine county, DWP sought an extraordinary writ to bar this transfer. The writ was denied, and the Superior Court for Alpine County set a tentative trial date for March of 1980.

In January of that year, DWP cross-complained against 117 individuals and entities claiming water rights in the Mono Basin. On February 20, 1980, one cross-defendant, the United States, removed the case to the District Court for the Eastern District of California. On DWP's motion, the district court stayed its proceedings under the federal abstention doctrine[12] to allow resolution by California

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only the state or the United States could sue to enjoin diversions which might imperil downstream navigability. Judicial decisions since those cases, however, have greatly expanded the right of a member of the public to sue as a taxpayer or private attorney general. (See *Van Atta v. Scott* (1980) 27 Cal.3d 424, 447-450 [166 Cal.Rptr. 149, 613 P.2d 210], and cases there cited.) Consistently with these decisions, *Marks v. Whitney, supra,* 6 Cal.3d 251, expressly held that any member of the general public (p. 261) has standing to raise a claim of harm to the public trust. (Pp. 261-262; see also *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183 [161 Cal.Rptr. 466, 605 P.2d 1], in which we permitted a public interest organization to sue to enjoin allegedly unreasonable uses of water.) We conclude that plaintiffs have standing to sue to protect the public trust.

[12]The federal practice of abstention sprang from the decision in *Railroad Comm'n. v. Pullman Co.* (1941) 312 U.S. 496 [85 L.Ed. 971, 61 S.Ct. 643]. (See generally, Wright et al., Federal Practice and Procedure, § 4241 et seq.) In *Pullman,* the Supreme Court held that, where resolution of an open state question presented in a federal action might prevent the federal court from reaching a constitutional question in that action, the court should stay its proceedings and order the parties to seek resolution of the state question in state courts. In *Pullman*-type cases, the federal court retains jurisdiction so that it may either apply the resolved

courts of two important issues of California law: "1. What is the interrelationship of the public trust doctrine and the California water rights system, in the context of the right of the Los Angeles Department of Water and Power ('Department') to divert water from Mono Lake pursuant to

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state law, or resolve the state question itself if the state courts refuse to do so for any reason.

Though federal abstention was originally limited to *Pullman*-type cases, the grounds for abstention were later expanded in accordance with the policies of federalism. Abstention is now "appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." (*Colorado River Water Cons. Dist. v. U.S.* (1976) 424 U.S. 800, 814 [47 L.Ed.2d 483, 496, 96 S.Ct. 1236], citing *Louisiana P. & L. Co. v. Thibodaux City* (1959) 360 U.S. 25 [3 L.Ed.2d 1058, 79 S.Ct. 1070] and *Kaiser Steel Corp. v. W. S. Ranch Co.* (1968) 391 U.S. 593 [20 L.Ed.2d 835, 88 S.Ct. 1753].)

Kaiser Steel is similar to the case at bar. In that diversity case, W. S. Ranch Co. sued Kaiser Steel for trespass. Kaiser claimed that a New Mexico statute authorized it to trespass as necessary for use of its water rights granted by New Mexico. The ranch replied that if the statute so authorized Kaiser, the statute would violate the state constitution, which allowed the taking of private property only for "public use." Both the district court and the court of appeals reached the merits of the case after denying Kaiser's motion to stay the determination until conclusion of a declaratory relief action then pending in New Mexico courts. The United States Supreme Court reversed, reasoning in a *per curiam* opinion that "[t]he Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, is truly a novel one . . . [, and] will eventually have to be resolved by the New Mexico courts . . . . Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource." (*Kaiser Steel Corp. v. W. S. Ranch Co., supra*, 391 U.S. at p. 594 [20 L.Ed.2d at p. 837.)

permits and licenses issued under the California water rights system? In other words, is the public trust doctrine in this context subsumed in the California water rights system, or does it function independently of that system? Stated differently, can the plaintiffs challenge the Department's permits and licenses by arguing that those permits and licenses are limited by the public trust doctrine, or must the plaintiffs challenge the permits and licenses by arguing that the water diversions and uses authorized thereunder are not 'reasonable or beneficial' as required under the California water rights system? [¶] 2. Do the exhaustion principles applied in the water rights context apply to plaintiffs' action pending in the United States District Court for the Eastern District of California?"[13]

In response to this order, plaintiffs filed a new complaint for declaratory relief in the Alpine County Superior Court.[14] On November 9, 1981, that court entered summary

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[13]DWP objected to the form of the abstention order, and petitioned the United States Court of Appeals for the Ninth Circuit for leave to file an interlocutory appeal. The Ninth Circuit denied this petition.

[14]DWP argues that the second superior court action, filed after the federal court's abstention order, constitutes a request for an advisory opinion and thus seeks relief beyond the jurisdiction of the California courts. (See *Younger v. Superior Court* (1978) 21 Cal.3d 102, 119-120 [145 Cal.Rptr. 674, 577 P.2d 1014], and cases there cited.) No California case has discussed the propriety of a declaratory relief action filed to resolve an unsettled issue of California law following a federal court abstention. A holding that such a suit is an improper attempt to obtain an advisory opinion, however, would constitute a decision by the California courts to refuse to cooperate in the federal abstention procedure. It would thus compel federal courts to decide unsettled questions of California law which under principles of sound judicial administration (see *Kaiser Steel Corp. v. W. S. Ranch Co.*, *supra*, 391 U.S. 593, 594 [20 L.Ed.2d 835, 837]) should be resolved by the state courts.

judgment against plaintiffs. Its notice of intended ruling stated that "[t]he California water rights system is a comprehensive and exclusive system for determining the legality of the diversions of the City of Los Angeles in the Mono Basin .... The Public Trust Doctrine does not function independently of that system. This Court concludes that as regards the right of the City of Los Angeles to divert waters in the Mono Basin that the Public Trust Doc-

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The usual objections to advisory opinions do not apply to the present case. This is not a collusive suit (compare *People v. Pratt* (1866) 30 Cal. 223), nor an attempt to get the courts to resolve a hypothetical future disagreement (compare *Younger v. Superior Court, supra,* 21 Cal.3d 102). It is, rather, one phase of a hotly contested current controversy. The only conceivable basis for refusing to decide the present case is that our decision will not finally resolve that controversy, but will serve only as an interim resolution of some issues necessary to the final decision. That fact, however, is insufficient to render the issue nonjusticiable. As the Court of Appeal stated in response to a similar contention, it is in the interest of the parties and the public that a determination be made: "even if that determination be but one step in the process, it is a useful one." (*Regents of University of California v. State Bd. of Equalization* (1977) 73 Cal.App.3d 660, 664 [140 Cal.Rptr. 857].)

If the issue of justiciability is in doubt, it should be resolved in favor of justiciability in cases of great public interest. (See, e.g., *California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790, 801 [172 P.2d 4, 167 A.L.R. 306] [trial court's determination of justiciability will not be overturned on appeal absent clear showing of abuse of discretion]; *Golden Gate Bridge etc. Dist. v. Felt* (1931) 214 Cal. 308, 315-319 [5 P.2d 585] [jurisdiction retained over admittedly friendly suit of public importance, where dismissal would have delayed construction of Golden Gate Bridge]; *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 26 [61 Cal.Rptr. 618] [doubts about the justiciability of a dispute should be resolved in favor of immediate adjudication, where "the public is interested in the settlement of the dispute."].)

trine is subsumed in the water rights system of the state." With respect to exhaustion of administrative remedies, the superior court concluded that plaintiffs would be required to exhaust their remedy before the Water Board either under a challenge based on an independent public trust claim or one based on asserted unreasonable or nonbeneficial use of appropriated water.

Plaintiffs filed a petition for mandate directly with this court to review the summary judgment of the Alpine County Superior Court. We issued an alternative writ and set the case for argument.

2. *The Public Trust Doctrine in California.*

"By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea." (Institutes of Justinian 2.1.1.) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns "all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people.'" (*Colberg, Inc. v. State of California* ex rel. *Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 416 [62 Cal.Rptr. 401, 432 P.2d 3].)[15] The State of California acquired title

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[15]Spanish law and subsequently Mexican law also recognized the public trust doctrine. (See *City of Los Angeles v. Venice Peninsula Properties* (1982) 31 Cal.3d 288, 297 [182 Cal.Rptr. 599, 644 P.2d 792].) Commentators have suggested that the public trust rights under Hispanic law, guaranteed by the Treaty of Guadalupe Hidalgo, serve as an independent basis for the public trust doctrine in California. (See Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right* (1980) 14 U.C. Davis L.Rev. 195, 197; Dyer, *California Beach Access: The Mexican Law and the Public Trust* (1972) 2 Ecology L.Q. 571.)

as trustee to such lands and waterways upon its admission to the union (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521 [162 Cal.Rptr. 327, 606 P.2d 362] and cases there cited); from the earliest days (see *Eldridge v. Cowell* (1854) 4 Cal. 80, 87) its judicial decisions have recognized and enforced the trust obligation.[16]

Three aspects of the public trust doctrine require consideration in this opinion: the purpose of the trust; the scope of the trust, particularly as it applies to the nonnavigable tributaries of a navigable lake; and the powers and duties of the state as trustee of the public trust. We discuss these questions in the order listed.

(a) *The purpose of the public trust.*

The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. As we observed in *Marks v. Whitney, supra*, 6 Cal.3d 251, "[p]ublic trust easements [were] traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes." (P. 259.) We went on, however, to hold that the traditional triad of uses—navigation, commerce and fishing—did not limit the public interest in the trust res. In language of special importance to the present setting, we

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[16]For the history of the public trust doctrine, see generally Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention* (1970) 68 Mich.L.Rev. 471; Stevens, *op. cit. supra*, 14 U.C. Davis L.Rev. 195.

stated that "[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. [Citation.] There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." (Pp. 259-260.)

Mono Lake is a navigable waterway. (*City of Los Angeles v. Aitken, supra,* 10 Cal.App.2d 460, 466.) It supports a small local industry which harvests brine shrimp for sale as fish food, which endeavor probably qualifies the lake as a "fishery" under the traditional public trust cases. The principal values plaintiffs seek to protect, however, are recreational and ecological—the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under *Marks v. Whitney, supra,* 6 Cal.3d 251, it is clear that protection of these values is among the purposes of the public trust.

(b) *The scope of the public trust.*

Early English decisions generally assumed the public trust was limited to tidal waters and the lands exposed and covered by the daily tides (see Stevens, *op. cit. supra,* 14 U.C. Davis L.Rev. 195, 201 and authorities there cited); many American decisions, including the leading California cases, also concern tidelands. (See, e.g., *City of Berkeley*

v. Superior Court (1980) 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362]; *Marks v. Whitney, supra,* 6 Cal.3d 251; *People v. California Fish Co.* (1913) 166 Cal. 576 [138 P. 79].) It is, however, well settled in the United States generally and in California that the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams. (See *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110] (Lake Michigan); *State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210 [172 Cal.Rptr. 696, 625 P.2d 239] (Clear Lake); *State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240 [172 Cal.Rptr. 713, 625 P.2d 256] (Lake Tahoe); *People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138 [4 P. 1152] (Sacramento River); *Hitchings v. Del Rio Woods Recreation & Park Dist.* (1976) 55 Cal.App.3d 560 [127 Cal.Rptr. 830] (Russian River).)[17]

Mono Lake is, as we have said, a navigable waterway. The beds, shores and waters of the lake are without question protected by the public trust. The streams diverted by DWP, however, are not themselves navigable. Accordingly, we must address in this case a question not discussed in any recent public trust case—whether the public trust limits conduct affecting nonnavigable tributaries to navigable waterways.

This question was considered in two venerable California decisions. The first, *People v. Gold Run D. & M. Co.* (1884)

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[17]A waterway usable only for pleasure boating is nevertheless a navigable waterway and protected by the public trust. (See *People* ex rel. *Younger v. County of El Dorado* (1979) 96 Cal.App.3d 403 [157 Cal.Rptr. 815] (South Fork of American River); *People* ex rel. *Baker v. Mack* (1971) 19 Cal.App.3d 1040 [97 Cal.Rptr. 448] (Fall River).)

66 Cal. 138 [4 P. 1152], is one of the epochal decisions of California history, a signpost which marked the transition from a mining economy to one predominately commercial and agricultural. The Gold Run Ditch and Mining Company and other mining operators used huge water cannon to wash gold-bearing gravel from hillsides; in the process they dumped 600,000 cubic yards of sand and gravel annually into the north fork of the American River. The debris, washed downstream, raised the beds of the American and Sacramento Rivers, impairing navigation, polluting the waters, and creating the danger that in time of flood the rivers would turn from their channels and inundate nearby lands.

Although recognizing that its decision might destroy the remains of the state's gold mining industry, the court affirmed an injunction barring the dumping. The opinion stressed the harm to the navigability of the Sacramento River, "a great public highway, in which the people of the State have paramount and controlling rights." (P. 146.) Defendant's dumping, the court said, was "an unauthorized invasion of the rights of the public to its navigation." (P. 147.) Rejecting the argument that dumping was sanctioned by custom and legislative acquiescence, the opinion asserted that "the rights of the people in the navigable rivers of the State are paramount and controlling. The State holds the absolute right to all navigable waters and the soils under them . . . . The soil she holds as trustee of a public trust for the benefit of the people; and she may, by her legislature, grant it to an individual; but she cannot grant the rights of the people to the use of the navigable waters flowing over it . . . ." (Pp. 151-152.)

In the second decision, *People v. Russ* (1901) 132 Cal. 102 [64 P. 111], the defendant erected dams on sloughs which adjoined a navigable river. Finding the sloughs nonnavigable, the trial court gave judgment for defendant. We reversed, directing the trial court to make a finding as to the effect of the dams on the navigability of the river. "Directly diverting waters in material quantities from a navigable stream may be enjoined as a public nuisance. Neither may the waters of a navigable stream be diverted in substantial quantities by drawing from its tributaries . . . . If the dams upon these sloughs result in the obstruction of Salt River as a navigable stream, they constitute a public nuisance." (P. 106.)

DWP points out that the *Gold Run* decision did not involve diversion of water, and that in *Russ* there had been no finding of impairment to navigation. But the principles recognized by those decisions apply fully to a case in which diversions from a nonnavigable tributary impair the public trust in a downstream river or lake. "If the public trust doctrine applies to constrain *fills* which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest." (Johnson, *Public Trust Protection for Stream Flows and Lake Levels* (1980) 14 U.C. Davis L.Rev. 233, 257-258; see Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law* (1980) 14 U.C. Davis L.Rev. 357, 359-360.)

We conclude that the public trust doctrine, as recognized and developed in California decisions, protects navigable

waters[18] from harm caused by diversion of nonnavigable tributaries.[19]

(c) *Duties and powers of the state as trustee.*

In the following review of the authority and obligations of the state as administrator of the public trust, the dominant theme is the state's sovereign power and duty to exercise continued supervision over the trust. One consequence, of importance to this and many other cases, is that parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.

As we noted recently in *City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515, the decision of the United States Supreme Court in *Illinois Central Railroad Company v. Illinois, supra,* 146 U.S. 387, "remains the primary authority even today, almost nine decades after it was decided." (P. 521.) The Illinois Legislature in 1886 had granted the railroad in fee simple 1,000 acres of submerged lands, virtually the entire Chicago waterfront. Four years later it sought to revoke that grant. The Supreme Court upheld the revocatory legislation. Its opinion explained that lands under navigable waters conveyed to private parties for wharves, docks, and other structures in furtherance

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[18]For review of California decisions on navigability, see Dunning, *op. cit. supra,* 14 U.C. Davis L.Rev. 357, 384-386.

[19]In view of the conclusion stated in the text, we need not consider the question whether the public trust extends for some purposes—such as protection of fishing, environmental values, and recreation interests—to nonnavigable streams. For discussion of this subject, see Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy* (1982) 22 Santa Clara L.Rev. 63, 85.

of trust purposes could be granted free of the trust because the conveyance is consistent with the purpose of the trust. But the legislature, it held, did not have the power to convey the entire city waterfront free of trust, thus barring all future legislatures from protecting the public interest. The opinion declares that: "A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waterways, they cannot be placed entirely beyond the direction and control of the State." (Pp. 453-454 [36 L.Ed. pp. 1042-1043].)

Turning to the *Illinois Central* grant, the court stated that: "Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State

judges best is, we think, incontrovertible. . . . The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining." (Pp. 455-456 [36 L.Ed. p. 1043].)

The California Supreme Court indorsed the *Illinois Central* principles in *People v. California Fish Co.* (1913) 166 Cal. 576 [138 P. 79]. *California Fish* concerned title to about 80,000 acres of tidelands conveyed by state commissioners pursuant to statutory authorization. The court first set out principles to govern the interpretation of statutes conveying that property: "[S]tatutes purporting to authorize an abandonment of . . . public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation." (*Id.*, at p. 597.) Applying these principles, the court held that because the statute in question and the grants pursuant thereto were not made for trust purposes, the grantees did not acquire absolute title: instead, the grantees "own the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as ad-

ministrator and controller of these public uses and the public trust therefor, to enter upon and possess the same for the preservation and advancement of the public uses and to make such changes and improvements as may be deemed advisable for those purposes." (*Id.*, at pp. 598-599.)

Finally, rejecting the claim of the tideland purchasers for compensation, the court stated they did not lose title, but retained it subject to the public trust. (See pp. 599-601.) While the state may not "retake the absolute title without compensation" (p. 599), it may without such payment erect improvements to further navigation and take other actions to promote the public trust.[20]

Boone v. Kingsbury (1928) 206 Cal. 148 [273 P. 797], presents another aspect of this matter. The Legislature authorized the Surveyor-General to lease trust lands for oil drilling. Applying the principles of *Illinois Central*, the court upheld that statute on the ground that the derricks would not substantially interfere with the trust. Any licenses granted by the statute, moreover, remained subject to the trust: "The state may at any time remove [the]

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[20]In *Mallon* v. *City of Long Beach* (1955) 44 Cal.2d 199 [282 P. 2d 481], the court held that revenues derived from the use of trust property ordinarly must be used for trust purposes. (Pp. 205-206.) (See also *City of Long Beach* v. *Morse* (1947) 31 Cal.2d 254 [188 P.2d 17]; *State of California* ex rel. *State Lands Com.* v. *County of Orange* (1982) 134 Cal.App.3d 20 [184 Cal.Rptr. 423].) The Legislature could abandon the trust over the proceeds, the court said, absent evidence that the abandonment would impair the power of future legislatures to protect and promote trust uses. (P. 207.) So long as the tidelands themselves remained subject to the trust, however, future legislatures would have the power to revoke the abandonment and reestablish a trust on the revenues. (*Ibid.*) (See *City of Coronado* v. *San Diego Unified Port District* (1964) 227 Cal.App.2d 455, 473-474 [38 Cal.Rptr. 834].)

structures . . . , even though they have been erected with its license or consent, if it subsequently determines them to be purprestures or finds that they substantially interfere with navigation or commerce." (Pp. 192-193.)[21]

Finally, in our recent decision in *City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515, we considered whether deeds executed by the Board of Tidelands Commissioners pursuant to an 1870 act conferred title free of the trust. Applying the principles of earlier decisions, we held that the grantees' title was subject to the trust, both because the Legislature had not made clear its intention to

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[21]In *Colberg, Inc.* v. *State of California* ex rel. *Dept. Pub. Wks., supra,* 67 Cal.2d 408, the state constructed a freeway bridge which partially impaired navigation in the Stockton Deep Water Ship Channel. Upstream shipyard owners, disclaiming any reliance on the public trust, filed suit for damages on a theory of inverse condemnation. The opinion stated that "the state, as trustee for the benefit of the people, has power to deal with its navigable waters in any manner consistent with the improvement of commercial intercourse, whether navigational or otherwise." (P. 419.) It then concluded that lands littoral to navigable waters are burdened by a navigational servitude in favor of the state and, absent an actual taking of those lands, the owners cannot claim damages when the state acts within its powers.

We agree with DWP and the state that *Colberg* demonstrates the power of the state, as administrator of the public trust, to prefer one trust use over another. We cannot agree, however, with DWP's further contention that *Colberg* proves the power of a state agency to abrogate the public trust merely by authorizing a use inconsistent with the trust. Not only did plaintiffs in *Colberg* deliberately decline to assert public trust rights, but the decision rests on the power of the state to promote one trust purpose (commerce) over another (navigation), not on any power to grant rights free of the trust. (See Dunning, *op. cit. supra,* 14 U.C. Davis L.Rev. 357, 382-288.)

authorize a conveyance free of the trust and because the 1870 act and the conveyances under it were not intended to further trust purposes.

Once again we rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required: "We do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the 1870 act will, like the grantees in *California Fish*, hold it subject to the public trust." (P. 532.)[22]

In summary, the foregoing cases amply demonstrate the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust (see *City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515). Acquisition of a right to use former trust property free of trust restrictions is a rare thing. It is possible only if (a) the Legislature intended to grant a right free of the trust (and under *California Fish* statutes should be interpreted

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[22]We noted, however, that "any improvements made on such lands could not be appropriated by the state without compensation." (Pp. 533-534, citing *Illinois Central Railroad Co.* v. *Illinois, supra,* 146 U.S. 387, 455 [36 L.Ed. 1018, 1043].)

In *State of California* v. *Superior Court (Fogerty), supra,* 29 Cal. 3d 240, 249, we stated that owners of shoreline property in Lake Tahoe would be entitled to compensation if enforcement of the public trust required them to remove improvements. By implication, however, the determination that the property was subject to the trust, despite its implication as to future uses and improvements, was not considered a taking requiring compensation.

if reasonably possible to avoid such an intention), and (b) either the grant serves the purpose of the trust or the grantee, in reasonable reliance on the grant, has rendered the property unsuitable for trust purposes. Except for such rare instances, the grantee holds subject to the trust, and while he may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes.

Since the public trust doctrine does not prevent the state from choosing between trust uses (*Colberg, Inc. v. State of California, supra,* 67 Cal.2d 408, 419; *County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 707 [106 Cal.Rptr. 825]), the Attorney General of California, seeking to maximize state power under the trust, argues for a broad concept of trust uses. In his view, "trust uses" encompass all public uses, so that in practical effect the doctrine would impose no restrictions on the state's ability to allocate trust property. We know of no authority which supports this view of the public trust, except perhaps the dissenting opinion in *Illinois Central Railroad Co. v. Illinois, supra,* 146 U.S. 387. All decisions and commentators assume that "trust uses" relate to uses and activities in the vicinity of the lake, stream, or tidal reach at issue (see e.g., *County of Los Angeles v. Aitken, supra,* 10 Cal.App.2d 460, 468-469; *State v. County of Orange, supra,* 134 Cal.App.3d 20; Sax, *op. cit. supra,* 68 Mich. L.Rev. 471, 542.) The tideland cases make this point clear; after *City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515, no one could contend that the state could grant tidelands free of the trust merely because the grant served some public purpose, such as

increasing tax revenues, or because the grantee might put the property to a commercial use.

Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

3. *The California Water Rights System.*

"It is laid down by our law writers, that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use." (*Eddy v. Simpson* (1853) 3 Cal. 249, 252.) Hence, the cases do not speak of the ownership of water, but only of the right to its use. (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 554-555 [81 P.2d 533]; see generally Hutchins, The Cal. Law of Water Rights (1956) pp. 36-38; 1 Rogers & Nichols, Water for Cal. (1967) p. 191.) Accordingly, Water Code section 102 provides that "[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."

Our recent decision in *People v. Shirokow* (1980) 26 Cal. 3d 301 [162 Cal.Rptr. 30, 605 P.2d 859], described the early history of the appropriative water rights system in California. We explained that "California operates under the so-called dual system of water rights which recognizes both the appropriation and the riparian doctrines. (Hutchins, The California Law of Water Rights, *supra*, at pp. 40,

55-67.) The riparian doctrine confers upon the owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land. The appropriation doctrine contemplates the diversion of water and applies to 'any taking of water for other than riparian or overlying uses.' (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925 [207 P.2d 17], and cases there cited.) . . .

". . . . . .

"Common law appropriation originated in the gold rush days when miners diverted water necessary to work their placer mining claims. The miners adopted among themselves the priority rule of 'first in time, first in right,' and California courts looked to principles of equity and of real property law to adjudicate conflicting claims. [Citations.] Thus it was initially the law in this state that a person could appropriate water merely by diverting it and putting it to use.

"The first appropriation statute was enacted in 1872 and provided for initiation of the appropriative right by the posting and recordation of notice. (Civ. Code, §§ 1410-1422.) The nonstatutory method retained its vitality and appropriative rights were acquired by following either procedure. [Citation.]

"Both methods were superseded by the 1913 enactment of the Water Commission Act, which created a Water Commission and provided a procedure for the appropriation of water for useful and beneficial purposes. The main purpose of the act was 'to provide an orderly method for the appropriation of [unappropriated] waters.' (*Temescal*

Water Co. v. Dept. Public Works (1955) 44 Cal.2d 90, 95 [280 P.2d 1]; *Bloss v. Rahilly* (1940) 16 Cal.2d 70, 75 [104 P.2d 1049].) By amendment in 1923, the statutory procedure became the exclusive means of acquiring appropriative rights. (§ 1255, Stats. 1923, ch. 87.) The provisions of the Water Commission Act, as amended from time to time, have been codified in Water Code, divisions 1 and 2. (Stats. 1943, ch. 368.)" (Pp. 307-308, fns. omitted.)

The role of the Water Board under the 1913 act, as *Shirokow* indicated, was a very limited one. The only water subject to appropriation under the act was water which was not then being applied to useful and beneficial purposes, and was not otherwise appropriated. (See Wat. Code, § 1201, based upon Stats. 1913, ch. 586, § 11, p. 1017.) Thus, appropriative rights acquired under the act were inferior to preexisting rights such as riparian rights, pueblo rights, and prior prescriptive appropriations. (See *City of San Diego v. Cuyamaca Water Co.* (1930) 209 Cal. 105 [287 P. 475].)

Judicial decisions confirmed this limited role. According to the courts, the function of the Water Board was restricted to determining if unappropriated water was available; if it was, and no competing appropriator submitted a claim, the grant of an appropriation was a ministerial act. (*Tulare Water Co. v. State Water Com.* (1921) 187 Cal. 533 [202 P. 874].)

In 1926, however, a decision of this court led to a constitutional amendment which radically altered water law in California and led to an expansion of the powers of the

board. In *Herminghaus v. South. California Edison Co.* (1926) 200 Cal. 81 [252 P. 607], we held not only that riparian rights took priority over appropriations authorized by the Water Board, a point which had always been clear, but that as between the riparian and the appropriator, the former's use of water was not limited by the doctrine of reasonable use. (Pp. 100-101.) That decision led to a constitutional amendment which abolished the right of a riparian to devote water to unreasonable uses, and established the doctrine of reasonable use as an overriding feature of California water law. (See *Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 596 [153 Cal.Rptr. 518], and cases there cited.)

Article X, section 2 (enacted in 1928 as art. XIV, § 3) reads in pertinent part as follows: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. . . . This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

This amendment does more than merely overturn *Herminghaus*—it establishes state water policy. All uses of water, including public trust uses, must now conform to the standard of reasonable use. (See *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367 [40 P.2d 486]; *People* ex rel. *State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 749-750 [126 Cal.Rptr. 851].)[23]

The 1928 amendment did not declare whether the instream uses protected by the public trust could be considered reasonable and beneficial uses. In a 1936 case involving Mono Lake, however, the court squarely rejected DWP's argument that use of stream water to maintain the lake's scenic and recreational values violated the constitutional provision barring unreasonable uses (*County of Los Angeles v. Aitken, supra*, 10 Cal.App.2d 460.) The point is now settled by statute, Water Code section 1243 providing that "[t]he use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water." (See also *California Trout, Inc. v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 816, 821 [153 Cal.Rptr. 672].)

The 1928 amendment itself did not expand the authority of the Water Board. The board remained, under controlling

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[23]After the effective date of the 1928 amendment, no one can acquire a vested right to the unreasonable use of water. See *Joslin* v. *Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 145 [60 Cal.Rptr. 377, 429 P.2d 889]; 1 Rogers & Nichols, *op. cit. supra*, p. 413 and cases there cited.) Rights acquired prior to 1928, however, may include a right to unreasonable use which, if taken by the state, requires compensation. (*U.S.* v. *Gerlach Live Stock Co.* (1950) 339 U.S. 725, 754 [94 L.Ed. 1231, 1250, 70 S.Ct. 955, 20 A.L.R. 2d 633].)

judicial decisions, a ministerial body with the limited task of determining priorities between claimants seeking to appropriate unclaimed water. More recent statutory and judicial developments, however, have greatly enhanced the power of the Water Board to oversee the reasonable use of water and, in the process, made clear its authority to weigh and protect public trust values.

In 1955, the Legislature declared that in acting on appropriative applications, "the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes . . . . The board may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated." (Wat. Code, § 1257.) In 1959 it stated that "[t]he use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water." (Wat. Code, § 1243.) Finally in 1969 the Legislature instructed that "[i]n determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whether it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses." (Wat. Code, § 1243.5.)

Judicial decisions have also expanded the powers of the Water Board. In *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90 [280 P.2d 1], we rejected the holding of *Tulare Water Co. v. State Water Com., supra,*

187 Cal. 533, and held that the decision of the board to grant an application to appropriate water was a quasi-judicial decision, not a ministerial act. In *People v. Shirokow, supra,* 26 Cal.3d 301, we held that the board could enjoin diversion of water by the owner of a prescriptive right who refused to comply with water conservation programs, even though his right was not based on a board license. Our decision rested on the legislative intent "to vest in the board expansive powers to safeguard the scarce water resources of the state." (P. 309; see also *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist., supra,* 26 Cal.3d 183, 194-195; *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339 [158 Cal.Rptr. 350, 599 P.2d 656].) Although the courts have refused to allow the board to appropriate water for instream uses, even those decisions have declared that the board has the power and duty to protect such uses by withholding water from appropriation. (*Fullerton v. State Water Resources Control Bd., supra,* 90 Cal.App.3d 590, 603-604; *California Trout, Inc. v. State Water Resources Control Bd., supra,* 90 Cal.App.3d 816, 821.)

Thus, the function of the Water Board has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters. This change necessarily affects the board's responsibility with respect to the public trust. The board of limited powers of 1913 had neither the power nor duty to consider interests protected by the public trust; the present board, in undertaking planning and allocation of water resources, is required by statute to take those interests into account.

4. *The relationship between the Public Trust Doctrine and the California Water Rights System.*

As we have seen, the public trust doctrine and the appropriative water rights system administered by the Water Board developed independently of each other. Each developed comprehensive rules and principles which, if applied to the full extent of their scope, would occupy the field of allocation of stream waters to the exclusion of any competing system of legal thought. Plaintiffs, for example, argue that the public trust is antecedent to and thus limits all appropriative water rights, an argument which implies that most appropriative water rights in California were acquired and are presently being used unlawfully.[24] Defendant DWP, on the other hand, argues that the public trust doctrine as to stream waters has been "subsumed" into the appropriative water rights system and, absorbed by that body of law, quietly disappeared; according to DWP, the recipient of a board license enjoys a vested right in perpetuity to take water without concern for the consequences to the trust.

We are unable to accept either position. In our opinion, both the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to

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[24]Plaintiffs suggest that appropriative rights expressly conferred by the Legislature would not be limited by the public trust doctrine. The Attorney General informs us, however, that the Legislature has rarely created water rights by express legislation, but instead has delegated that task to the Water Board.

an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust. Therefore, seeking an accommodation which will make use of the pertinent principles of both the public trust doctrine and the appropriative water rights system, and drawing upon the history of the public trust and the water rights system, the body of judicial precedent, and the views of expert commentators, we reach the following conclusions:

a. The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.[25]

b. As a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does

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[25]As we discussed earlier (*ante*, p. 440), there are two exceptions to the rule stated in text: one can acquire vested rights free of trust restraints when the property is no longer adaptable to trust uses or when the original grant was made to further trust purposes. It is unlikely that either exception will often apply to usufructuary water rights. (See discussion in Johnson, *op. cit. supra*, 14 U.C. Davis L.Rev. 233, 263-264.)

not promote, and may unavoidably harm, the trust uses at the source stream. The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values.[26] California's Constitution (see art. X, § 2), its statutes (see Wat. Code, §§ 100, 104), decisions (see, e.g., *Waterford I. Dist.* v. *Turlock I. Dist.* (1920) 50 Cal.App. 213, 220 [194 P. 757]), and commentators (e.g., Hutchins, The Cal. Law of Water Rights, *op. cit. supra*, p. 11) all emphasize the need to make efficient use of California's limited water resources: all recognize, at least implicitly, that efficient use requires diverting water from instream uses. Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel.

c. The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.[27] Just as the history of this state shows that appro-

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[26]In contrast, the population and economy of this state does *not* depend on the conveyance of vast expanses of tidelands or other property underlying navigable waters. (See Comment, *The Public Trust Doctrine and California Water Law: National Audubon Society, Dept. of Water and Power* (1982) 33 Hastings L.J. 653, 668.) Our opinion does not affect the restrictions imposed by the public trust doctrine upon transfer of such properties free of the trust.

[27]Amendments to the Water Code enacted in 1955 and subsequent years codify in part the duty of the Water Board to consider public trust uses of stream water. (See, *ante*, at p. 444.) The require-

priation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (See Johnson, *op. cit. supra,* 14 U.C. Davis L.Rev. 233, 256-257; Robie, *Some Reflections on Environmental Considerations in Water Rights Administration* (1972) 2 Ecology L.Q. 695, 710-711; Comment, *op. cit. supra,* 33 Hastings L.J. 653, 654.) As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust (see *United Plainsmen* v. *N.D. State Water Cons. Commission* (N.D. 247 N.W.2d 457, 462-463), and to preserve, so far as consistent with the public interest, the uses protected by the trust.

Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

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ments of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) impose a similar obligation. (See Robie, *op. cit. supra,* 2 Ecology L.Q. 695.)

These enactments do not render the judicially fashioned public trust doctrine superfluous. Aside from the possibility that statutory protections can be repealed, the noncodified public trust doctrine remains important both to confirm the state's sovereign supervision and to require consideration of public trust uses in cases filed directly in the courts without prior proceedings before the board.

The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.[28] The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses. In the case before us, the salient fact is that no responsible body has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct. This is not a case in which the Legislature, the Water Board, or any judicial body has determined that the needs of Los Angeles outweigh the needs of the Mono Basin, that the benefit gained is worth the price. Neither has any responsible body determined whether some lesser taking would better balance the diverse interests.[29] Instead, DWP acquired rights to the entire flow in 1940 from a water board

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[28]The state Attorney General asserts that the Water Board could also reconsider the DWP water rights under the doctrine of unreasonable use under article X, section 2. DWP maintains, however, that its use of the water for domestic consumption is prima facie reasonable. The dispute centers on the test of unreasonable use—does it refer only to inordinate and wasteful use of water, as in *Peabody* v. *City of Vallejo, supra,* 2. Cal.2d 351, or to any use less than the optimum allocation of water? (On this question, see generally *Joslin* v. *Marin Mun. Water Dist., supra,* 67 Cal.2d 132, 138-141.) In view of our reliance on the public trust doctrine as a basis for reconsideration of DWP's usufructuary rights, we need not resolve that controversy.

[29]The one objective study which has been done to date, the Report of the Interageny Task Force on Mono Lake recommended a sharp curtailment in the diversion of water by the DWP. (See Task Force Report at pp. 36-40.) The task force, however, had only the authority to make recommendations, and lacked power to adjudicate disputed issues of fact or law or to allocate water.

which believed it lacked both the power and the duty to protect the Mono Lake environment, and continues to exercise those rights in apparent disregard for the resulting damage to the scenery, ecology, and human uses of Mono Lake.

It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin.[30] No vested rights bar such reconsideration. We recognize the substantial concerns voiced by Los Angeles—the city's need for water, its reliance upon the 1940 board decision, the cost both in terms of money and environmental impact of obtaining water elsewhere. Such concerns must enter into any allocation decision. We hold only that they do not preclude a reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment.

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[30]In approving the DWP appropriative claim, the 1940 Water Board relied on Water Code section 106 which states that "[i]t is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." DWP points to this section, and to a 1945 enactment which declares a policy of protecting municipal water rights (Wat. Code, § 106.5), and inquires into the role of these policy declarations in any reconsideration of DWP's rights in the Mono Lake tributaries.

Although the primary function of these provisions, particularly section 106, is to establish priorities between competing appropriators, these enactments also declare principles of California water policy applicable to any allocation of water resources. In the latter context, however, these policy declarations must be read in conjunction with later enactments requiring consideration of in-stream uses (Wat. Code, §§ 1243, 1257, quoted *ante* at pp. 443-444) and judicial decisions explaining the policy embodied in the public-trust doctrine. Thus, neither domestic and municipal uses nor in-stream uses can claim an absolute priority.

5. *Exhaustion of Administrative Remedies.*

On motion for summary judgment, the trial court held that plaintiffs must exhaust their administrative remedies before the Water Board prior to filing suit in superior court. Plaintiffs, supported on this point by DWP, contend that the courts and the board have concurrent jurisdiction over the merits of their claim, and thus that they had no duty to exhaust any administrative remedy before filing suit.

The first question we must face is whether plaintiffs had any Water Board remedy to exhaust. There appear to be two possible grounds upon which plaintiffs could initiate a board proceeding. First, they could claim that DWP was making an unreasonable use of water, in violation either of controlling constitutional and statutory provisions or of the terms of DWP's license. (See Cal.Admin. Code, tit. 23, § 764.10.) Plaintiffs, however, expressly disclaim any intent to charge unreasonable use, and announced instead their intent to found their action solely on the public trust doctrine, so this remedy is unavailable.

The only alternative method of bringing the issue before the board is a proceeding invoking Water Code section 2501, which provides that "[t]he board may determine, in the proceedings provided for in this chapter, all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right." We recognize certain difficulties in applying this remedy to the present case. It is unclear whether a claim based on the public trust is a "water right" in the technical sense of that term. (See Dunning, *op. cit. supra*, 14 U.C. Davis L.Rev. 357, 383; cf. *Fullerton v. State Water Resources*

Control Bd., supra, 90 Cal.App.3d 590, 604.) Also, the relevant chapter of the Water Code refers to petitions filed by "claimants to water" (see, e.g., Wat. Code, § 2525); it is uncertain whether a person asserting the interest of the public trust would be considered a "claimant."

In recent decisions, however, we have discerned a legislative intent to grant the Water Board a "broad," "open-ended," "expansive" authority to undertake comprehensive planning and allocation of water resources. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 348-349, 350, fn. 5 [158 Cal.Rptr. 350, 599 P.2d 656]; *People v. Shirokow, supra*, 26 Cal.3d 301, 309.) Both cases emphasized the board's power to adjudicate *all* competing claims, even riparian claims (*Long Beach*) and prescriptive claims (*Shirokow*) which do not fall within the appropriative licensing system. Having construed section 2501 to give the board broad substantive powers—powers adequate to carry out the legislative mandate of comprehensive protection of water resources—it would be inconsistent to read that statute so narrowly that the board lacked jurisdiction to employ those powers.

We therefore construe Water Code section 2501 to permit a person claiming that a use of water is harmful to interests protected by the public trust to seek a board determination of the allocation of water in a stream system, a determination which may include reconsideration of rights previously granted in that system. Under this interpretation of section 2501, plaintiffs have a remedy before the Water Board.

Must plaintiffs exhaust this administrative remedy before filing suit in superior court? A long line of decisions

indicates that remedies before the Water Board are not exclusive, but that the courts have concurrent original jurisdiction.

As we observed earlier in this opinion (see *ante*, pp.442-443), for much of its history the Water Board was an agency of limited scope and power. Many water right disputes, such as those involving riparian rights, pueblo rights, and prescriptive rights, did not fall within the jurisdiction of the board. But even in cases which arguably came within the board's limited jurisdiction, the parties often filed directly in the superior court, which assumed jurisdiction and decided the case. (See, e.g., *Allen v. California Water & Tel. Co.* (1946) 29 Cal.2d 466 [176 P.2d 8].) All public trust cases cited in this opinion were filed directly in the courts. Thus, a 1967 treatise on California water law could conclude that "[g]enerally, the superior courts of California have original jurisdiction over water rights controversies . . ." but in some cases must share concurrent jurisdiction with administrative bodies. (1 Rogers & Nichols, *op. cit. supra*, at p. 528.)

Although prior cases had assumed jurisdictional concurrency, we first discussed that question in our decision in *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1977) 20 Cal.3d 327 [142 Cal.Rptr. 904, 572 P.2d 1128] (*EDF I*), and our later decision in the same case on remand from the United States Supreme Court, *Environmental Defense Fund, Inc. v. East Bay. Mun. Utility Dist., supra*, 26 Cal.3d 183 (*EDF II*). Plaintiff in that case sued to enjoin performance of a contract for diversion of water from the American River on the ground that under the doctrine of reasonable use the utility district should instead use reclaimed waste water.

Intervener County of Sacramento claimed the diversion was an unreasonable use because the diversion point was too far upstream, and would deprive downstream users of the water.

In *EDF I* we held that the Legislature had intended to vest regulation of waste water reclamation in the Water Board because of the need for expert evaluation of the health and feasibility problems involved. We therefore concluded that the plaintiffs' superior court action to compel waste water reclamation was barred by failure to exhaust administrative remedies. (20 Cal.3d 327, 343-344.)

EDF I further held the intervener's claim concerning the diversion point was barred by federal preemption (p. 340), but the United States Supreme Court vacated our decision and remanded for reconsideration in light of *California v. United States* (1978) 438 U.S. 645 [57 L.Ed.2d 1018, 98 S.Ct. 2985]. On remand, we found no federal preemption, and further held that intervener's claim was not defeated by failure to exhaust administrative remedies. Noting that "the courts [had] traditionally exercised jurisdiction of claims of unreasonable water use" (*EDF II*, 26 Cal.3d 183, 199), we stated that "[a]part from overriding considerations such as are presented by health and safety dangers involved in the reclamation of waste water, we are satisfied that the courts have concurrent jurisdiction with . . . administrative agencies to enforce the self-executing provisions of article X, section 2." (P. 200.)[31]

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[31]This case does not fall within the exception established in *EDF II* granting the board exclusive jurisdiction over reclamation of waste waters and other matters involving a potential danger to public health. (See *EDF II*, pp. 199-200.) The issues involving Mono Lake are complex, and because the emerging lakebed may

The present case involves the same considerations as those before us in the *EDF* cases. On the one hand, we have the board with experience and expert knowledge, not only in the intricacies of water law but in the economic and engineering problems involved in implementing water policy.[22] The board, moreover, is charged with a duty of comprehensive planning, a function difficult to perform if some cases bypass board jurisdiction. On the other hand, we have an established line of authority declaring the concurrent jurisdiction of the courts, and reliance upon that authority by the plaintiffs.

We have seriously considered whether, in light of the broad powers and duties which the Legislature has conferred on the Water Board, we should overrule *EDF II* and declare that henceforth the board has exclusive primary jurisdiction in matters falling within its purview. We perceive, however, that the Legislature has chosen an alternative means of reconciling board expertise and judicial precedent. Instead of granting the board exclusive primary jurisdiction, it has enacted a series of statutes

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contribute to dust storms, the case includes a public health aspect. Nevertheless, those issues are more analogous to those typically decided by the courts under their concurrent jurisdiction (such as the claim of intervener in *EDF II* that the diversion point of water was too far upstream) than they are to the narrow and specialized problem of reclaiming waste water. If we read the exception in *EDF II* so broadly that any complex case with tangential effect on public health came within the board's exclusive jurisdiction, that exception would consume the rule of concurrent jurisdiction.

[22]We noted in *EDF I* that "[t]he scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts." (*EDF I*, *supra*, 20 Cal.3d 327, 344.)

designed to permit state courts, and even federal courts, to make use of the experience and expert knowledge of the board.

Water Code section 2000 provides that "[i]n any suit brought in any court of competent jurisdiction in this State for determination of rights to water, the court may order a reference to the board, as referee, of any or all issues involved in the suit." Section 2001 provides alternatively that the court "may refer the suit to the board for investigation of and report upon any or all of the physical facts involved." Finally, recognizing that some water cases will be filed in or transferred to federal courts, section 2075 provides that "[i]n case suit is brought in a federal court for determination of the rights to water within, or partially within, this State, the board may accept a reference of such suit as master or referee for the court."

These statutes necessarily imply that the superior court has concurrent original jurisdiction in suits to determine water rights, for a reference to the board as referee or master would rarely if ever be appropriate in a case filed originally with the board. The court, however, need not proceed in ignorance, nor need it invest the time required to acquire the skills and knowledge the board already possesses. When the case raises issues which should be considered by the board, the court may refer the case to the board. Thus the courts, through the exercise of sound discretion and the use of their reference powers, can substantially eliminate the danger that litigation will bypass

the board's expert knowledge and frustrate its duty of comprehensive planning.[33]

6. *Conclusion.*

This has been a long and involved answer to the two questions posed by the federal district court. In summarizing our opinion, we will essay a shorter version of our response.

The federal court inquired first of the interrelationship between the public trust doctrine and the California water rights system, asking whether the "public trust doctrine in this context [is] subsumed in the California water rights system, or . . . function[s] independently of that system?" Our answer is "neither." The public trust doctrine and the appropriative water rights system are parts of an integrated system of water law. The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources.

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[33]The state Attorney General argues that even though the courts generally possess concurrent jurisdiction in water cases, the board should have exclusive jurisdiction over actions attacking a board-granted water right. In view of the reference power of the courts, we think this exception unnecessary. The court presently has the power to refer such cases to the board whenever reference is appropriate; a rule of exclusive jurisdiction, requiring all such cases to be initiated before the board, would not significantly improve the fairness or efficiency of the process. In some cases, including the present one, it would lead to unproductive controversy over whether the plaintiff is challenging a right granted by the board or merely asserting an alleged right of higher priority.

Restating its question, the federal court asked: "[C]an the plaintiffs challenge the Department's permits and licenses by arguing that those permits and licenses are limited by the public trust doctrine, or must the plaintiffs . . . [argue] that the water diversions and uses authorized thereunder are not 'reasonable or beneficial' as required under the California water rights system?" We reply that plaintiffs can rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono Basin.

The federal court's second question asked whether plaintiffs must exhaust an administrative remedy before filing suit. Our response is "no." The courts and the Water Board have concurrent jurisdiction in cases of this kind. If the nature or complexity of the issues indicate that an initial determination by the board is appropriate, the courts may refer the matter to the board.

This opinion is but one step in the eventual resolution of the Mono Lake controversy. We do not dictate any particular allocation of water. Our objective is to resolve a legal conundrum in which two competing systems of thought—the public trust doctrine and the appropriative water rights system—existed independently of each other, espousing principles which seemingly suggested opposite results. We hope by integrating these two doctrines to clear away the legal barriers which have so far prevented either the Water Board or the courts from taking a new and objective look at the water resources of the Mono Basin. The human and environmental uses of Mono Lake—uses protected by the public trust doctrine—deserve to be

taken into account. Such uses should not be destroyed because the state mistakenly thought itself powerless to protect them.

Let a peremptory writ of mandate issue commanding the Superior Court of Alpine County to vacate its judgment in this action and to enter a new judgment consistent with the views stated in this opinion.[34]

Bird, C. J., Mosk, J., Kaus, J., and Reynoso, J., concurred.

KAUS, J.—I concur in the court's opinion. While I share Justice Richardson's reservations on the issue of concurrent jurisdiction, I doubt that the problem can be solved by making the question of exclusive board jurisdiction depend on such rather vague tests as those announced in *EDF I* and *EDF II*. If a majority of the court were inclined to reconsider the issue, I would respectfully suggest that the exclusive jurisdiction of the board should be broadened to include disputes such as the present one. This would, obviously, involve the overruling of certain precedents on which plaintiffs justifiably relied. The new rule should, therefore, not be applicable to them.

Since, however, the requisite majority interest in reconsidering the question of concurrent jurisdiction is lacking, I join the court's opinion.

RICHARDSON, J.—I concur with parts 1 through 4 of the majority opinion and with its analysis of the relation-

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[34]The superior court should determine whether plaintiffs are entitled to attorney fees under Code of Civil Procedure section 1021.5 and *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 938-940 [154 Cal.Rptr. 503, 593 P.2d 200].

ship between the public trust doctrine and the water rights system in this state. I respectfully dissent, however, from part 5 of the opinion wherein the majority holds that the courts and the California Water Resources Board (Water Board) have *concurrent* jurisdiction in cases of this kind. In my view, there are several compelling reasons for holding that the Water Board has exclusive original jurisdiction over the present dispute, subject of course to judicial review of its decision.

As the majority recognizes, the matter of concurrent jurisdiction involves the related issue of exhaustion of administrative remedies. It is well settled that where an administrative remedy is provided by statute, that remedy must be pursued and exhausted before the courts will act. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292 [109 P.2d 942, 132 A.L.R. 715].) This doctrine applies to disputes regarding water appropriated pursuant to permits issued by the Water Board. (*Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 106 [280 P.2d 1].) The majority concedes that plaintiffs had an administrative remedy available to them in the present case, namely, a proceeding under Water Code section 2501 "to seek a board determination of the allocation of water in a stream system," including "reconsideration of rights previously granted in that system." (*Ante*, p. 450.) Nevertheless, the majority concludes that prior cases of this court, together with certain statutory provisions *permitting* (but not requiring) reference of water disputes to the Water Board, both excuse plaintiffs' failure to exhaust their administrative remedy and allow the courts to exercise concurrent jurisdiction in cases of this kind. I reach a contrary conclusion.

As the majority explains (*ante,* p. 450), earlier cases which held that the court shared concurrent jurisdiction with the Water Board were decided at a time when the board "was an agency of limited scope and power," without authority to consider many water right issues such as the application of the public trust. Indeed, the Water Board in the present case itself had assumed that it lacked jurisdiction over public trust issues; the board's 1940 decision granting appropriative permits reflects that assumption. (*Ante,* pp. 427-428.) If, as the majority now holds, the Water Board's jurisdiction extends to public trust issues, it is entirely proper to apply the exhaustion of remedies principle and insist that plaintiffs seek reconsideration from the board before litigating the matter in court.

The majority relies primarily upon *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 198-200 [161 Cal.Rptr. 466, 605 P.2d 1] (*EDF II*), but our language in that case supports the view that, in cases of the kind now before us, the board has exclusive jurisdiction. In *EDF II,* we held that "Apart from overriding considerations," the courts have concurrent jurisdiction with the Water Board to enforce the self-executing constitutional proscriptions against unreasonable water use and diversion. (P. 200.) Most of the "overriding considerations" referred to in *EDF II* are present here.

Thus, in that case we observed that waste water reclamation disputes require consideration of such complex and "transcendent" factors as the potential danger to public health and safety and the feasibility of reclamation, fac-

tors which would require deference to "appropriate administrative agencies," such as the Water Board, and would foreclose concurrent court jurisdiction. (P. 199; see also *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1977) 20 Cal.2d 327, 343-344 [142 Cal.Rptr. 904, 572 P.2d 1128] (*EDF I*).) We repeated our earlier observation that "private judicial litigation involves piecemeal adjudication determining only the relative rights of the parties before the court, whereas in administrative proceedings comprehensive adjudication considers the interests of other concerned persons who may not be parties to the court action." (*EDF II*, at p. 199; see *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 359-360 [158 Cal.Rptr. 350, 599 P.2d 656].)

The same "overriding considerations" catalogued by us in *EDF II* seem applicable here. Although this case does not involve waste water reclamation, nevertheless the balancing of public trust values affecting Mono Lake and the water rights of a large metropolitan community presents similarly complex, overriding and "transcendent" issues which demand initial consideration by the Water Board. Only the board, which had issued the very licenses and permits now under challenge, possesses the experience and expertise needed to balance all of the various competing interests in reaching a fair and reasonable resolution of this vastly important litigation.

As we noted in *EDF I*, "The scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts." (20 Cal.3d at p. 344.) As the majority opinion herein amply demonstrates, similar complexities

are presented here. The majority concedes that (1) "The present case involves the same considerations as those before us in the *EDF* cases," (2) the Water Board possesses the expertise to resolve "the intricacies of water law" and "the economic and engineering problems involved in implementing water policy," and (3) the board "is charged with a duty of comprehensive planning, a function difficult to perform if some cases bypass board jurisdiction." (*Ante*, p. 450.) Thus, the case for exclusive board jurisdiction seems to me truly overwhelming.

The majority's suggestion that various statutory provisions contemplate the exercise of concurrent jurisdiction in cases of this kind is unconvincing. These provisions (Wat. Code, §§ 2000, 2001, 2075) merely authorize the courts in water rights cases to refer the issues to the Water Board for its determination as a referee. Obviously, these provisions do not purport to excuse a prior failure to exhaust available administrative remedies before the Water Board. Moreover, these provisions do not attempt to resolve the question, presented in the *EDF* cases, whether "overriding considerations" dictate an exception to the general rule of concurrent jurisdiction.

As we said in *EDF I*, "When . . . the statutory pattern regulating a subject matter integrates the administrative agency into the regulatory scheme and the subject of the litigation demands a high level of expertise within the agency's special competence, we are satisfied that the litigation in the first instance must be addressed to the agency. [Citation.]" (20 Cal.3d at p. 344.) That principle seems fully applicable here.

I would affirm the judgment.

Modification of Opinion by California Supreme Court

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33 Cal.3d 726a
(April 14, 1983)

[S.F. No. 24368. Apr. 14, 1983.]

NATIONAL AUDUBON SOCIETY et al., Petitioners,

v.

THE SUPERIOR COURT OF ALPINE COUNTY,
Respondent;
DEPARTMENT OF WATER AND POWER
OF THE CITY OF LOS ANGELES, et al.,
Real Parties in Interest.

[Modification of opinion (33 Cal.3d 419; ..... Cal.Rptr. ....., ... P.2d .....).]

THE COURT.—The opinion in this case, appearing at 33 Cal.3d 419, is hereby modified as follows:

In the second paragraph on page 440, delete from headnote marker (9) to the end of the paragraph, and substitute the following language: Except for those rare instances in which a grantee may acquire a right to use former trust property free of trust restrictions, the grantee holds subject to the trust, and while he may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes.

In the third paragraph on page 440, continuing to page 441, modify the last two sentences to read as follows: Most decisions and commentators assume that "trust uses" relate

to uses and activities in the vicinity of the lake, stream, or tidal reach at issue (see, e.g., *City of Los Angeles v. Aitken, supra,* 10 Cal.App.2d 460, 468-468; *State of California* ex rel. *State Lands Com. v. County of Orange, supra,* 134 Cal. App.3d 20; Sax, *op. cit. supra,* 68 Mich.L.Rev. 471, 542.) The tideland cases make this point clear; after City of Berkeley v. Superior Court, *supra,* 26 Cal.3d 515, no one could contend that the state could grant tidelands free of the trust merely because the grant served some public purpose, such as increasing tax revenues, or because the grantee might put the property to a commercial use.

In the first full paragraph on page 444, modify the last sentence to read as follows: Finally in 1969 the Legislature instructed that "[i]n determining the amount of water available for appropriation, the board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses."

On page 443, footnote 23, delete the sentence and citation reading: Rights acquired prior to 1928, however, may include a right to unreasonable use which, if taken by the state, requires compensation. (*U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 754 [94 L.Ed. 1231, 1250, 70 S.Ct. 955, 20 A.L.R.2d 633].)

On page 445, footnote 25, delete the existing language and substitute the following: As we discussed earlier *ante,* p. 440), there are rare exceptions to the rule stated in the text. It is unlikely that these exceptions will often apply to usufructuary water rights. (See discussion in Johnson, *op. cit. supra,* 14 U.C. Davis L.Rev. 233, 263-264.)

March 2, 1981 Order of U.S. District Court for the Eastern District of California, re Abstention

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civil S-80-127 LKK

NATIONAL AUDUBON SOCIETY,
a corporation, et al.,
Plaintiffs,

v.

DEPARTMENT OF WATER AND POWER
OF THE CITY OF LOS ANGELES,
Defendants.

[Filed Mar. 2, 1981]

ORDER

The Court vacates the Order entered January 19, 1981, and orders filed a new Order as follows:

Pages 1 through line 14 of page 9 are incorporated herein by reference and made a part hereof as if fully set forth herein.

ABSTENTION PROCEDURE

Depending upon the type of abstention adopted by the court, the resulting procedure will vary. The state has argued that this action comes under the provisions of *Burford* abstention as well as *Thibodeaux* abstention and that therefore the court should dismiss the action.

In *Colorado, supra,* the court delineated the parameters of abstention where the state law questions bear on public policy to include actions where the exercise of federal jurisdiction "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943) and *Alabama Pub. Serv. Comm's v. Southern R. Co.,* 341 U.S. 341 (1951).

The state argues that the California water system is a complicated and comprehensive system of regulation and that for the federal court to determine that the public trust doctrine is independent of the state administrative system would disrupt that system. Thus, the state asserts *Burford*-type abstention is appropriate and dismissal required. The state's argument begs the question presented by the case. To determine at this point that a federal court resolution of the action would disrupt the administrative processes would be to determine that plaintiffs' theory of the action will prevail. In *Burford, supra,* the court abstained and dismissed because the administrative agency had undoubted jurisdiction over the questions to be litigated before the federal court. The basis of abstention was the presence of a comprehensive administrative and judicial process which unquestionably could resolve the dispute. Whether the administrative agency has jurisdiction over plaintiffs' action is central to this action. The court therefore determines that the policies controlling *Burford*-type abstention do not apply in this action and dismissal is inappropriate.

Another procedure employed by the courts where abstention is appropriate is certification to the state court. *Clay v. Sun Insurance Office, Ltd.,* 363 U.S. 207 (1960). As

pointed out by counsel for Audubon, no such procedure exists between the California and the federal courts. Necessarily that procedure will not be adopted by this court.

In *Thibodeaux* and *Kaiser Steel* the court stayed the federal action to allow the state court to determine the issues in question through the use of declaratory relief. This approach appears appropriate in the present case. The court therefore stays this action with directions to the plaintiff to seek resolution of the following issues by declaratory relief in the state court from which this matter was removed:

1. What is the interrelationship of the public trust doctrine and the California water rights system, in the context of the right of the Los Angeles Department of Water and Power ("Department") to divert water from Mono Lake pursuant to permits and licenses issued under the California water rights system? In other words, is the public trust doctrine in this context subsumed in the California water rights system, or does it function independently of that system? Stated differently, can the plaintiffs challenge the Department's permits and licenses by arguing that those permits and licenses are limited by the public trust doctrine, or must the plaintiffs challenge the permits and licenses by arguing that the water diversions and uses authorized thereunder are not "reasonable or beneficial" as required under the California water rights system.

2. Do the exhaustion principles applied in the water rights context apply to plaintiffs' action pending in the United States District Court for the Eastern District of California?

The federal issue raised by the complaint will be addressed, if necessary, following the state court resolution of the public trust issue. The McCarren action brought by the Department of Water and Power is also stayed. Once a determination is made by the state court regarding the appropriate application of the public trust doctrine, this court will move forward on that claim as well.

Audubon has argued that staying this action and seeking declaratory relief from the state courts is inappropriate since the California courts do not render advisory opinions and an action for declaratory relief where the main suit is still before the federal court could not be considered such an action. Admittedly Audubon has found no case in which the California courts have refused to proceed in such circumstances. In order that this action not be further delayed, the court additionally directs defendant to raise this issue before the state court as part of its responsive pleadings.

Any party to the present litigation is permitted to intervene in the state court action, provided that party does not seek to expand the scope of the declaratory relief action outlined above.

The parties are directed to file copies of all proceedings in the state court with this court. In the event declaratory relief is not promptly sought from the state court, or if it cannot promptly be obtained, this court "having retained complete control of the litigation will doubtless assert it to decide [the issues upon which it has abstained]." 360 U.S. at 29. Because the court recognizes that the approach it now takes does not fall squarely within any of the abstention

cases, this order is certified for immediate appeal to the Ninth Circuit under 28 U.S.C. § 1292(b).

IT IS THEREFORE ORDERED THAT:

1. Plaintiffs' motion to amend is granted;

2. Plaintiffs' motion to sever or separate is deferred;

3. Plaintiffs' motion for a hearing on the issue of a preliminary injunction is denied;

4. The motion of the state to amend is granted;

5. The motion of the Department to dismiss the third and fourth causes of action of its cross-complaint is granted;

6. The motion of the Department to remand is denied;

7. This action be stayed until either a determination on the public trust issues is made by the state court or until that court determines it cannot proceed on those issues; and

8. The parties are ordered to file Status Reports pursuant to Local Rule 125 in ninety (90) days. The court will determine at that time whether a Status Conference is appropriate.

DATED: February 27, 1981.

/s/ Lawrence K. Karlton
U.S. District Judge

January 19, 1981 Order of U.S. District Court for the Eastern District of California re Abstention

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civil S-80-127 LKK

NATIONAL AUDUBON SOCIETY,
a corporation, et al.,
Plaintiffs,

v.

DEPARTMENT OF WATER AND POWER
OF THE CITY OF LOS ANGELES,
Defendant.

[Filed Jan. 19, 1981]

ORDER

Plaintiffs National Audubon Society, Friends of the Earth, the Mono Lake Committee, the Los Angeles Audubon Society, and four individuals filed this action against the Los Angeles Department of Water and Power. The gravamen of the complaint is plaintiffs' assertion that the defendant's diversion of water from the Mono Lake Basin is seriously damaging the environment of the Basin. The complaint alleges violation of the public trust, violation of California Constitution Article XVI, section 6 (prohibiting a gift by the state of a state asset), a quiet title action to establish the public trust rights in the water of the Basin, public and private nuisance, and violation of California Constitution, Article X, section 4 (which prohibits obstruction of navigable waters).

In its cross-complaint the Department sought adjudication of the Basin's water rights, a quieting of title to those rights, declaratory relief relative to its use of the water, and a declaration that if the United States had jurisdiction over California's navigational trust, that the United States has consented to any impairment thereof.

The State of California cross-complained for declaratory relief asserting that the public trust was to be administered by the state through its water rights system, and that plaintiffs were precluded from bringing the action without exhausting their administrative remedies.

The action was removed by the United States and this court in its Memorandum and Order of July 17, 1980, found that removal appropriate.

Plaintiffs now move to amend their complaint to add a federal cause of action, to have the complaint severed from the cross-actions or tried separately and to have a date for a preliminary injunction hearing set. The Department moves to dismiss its third and fourth causes of action and to remand the case to the state court. California seeks to amend its cross-complaint to add a request for declaratory relief.

MOTION TO AMEND

Plaintiffs seek to amend their complaint under Rule 15(a) to add a cause of action alleging a new legal theory which will create federal jurisdiction in the original action—a cause of action based on the federal common law of nuisance. *See Illinois v. Milwaukee,* 406 U.S. 91 (1972). The Department has opposed that motion on two grounds: first, it asserts that the amendment will be subject to a motion to dismiss since federal common law nuisance ac-

tions apply only where there is a need for interstate uniformity. Secondly, the Department asserts that the amendment raises new issues of fact and law. The Department states that it will be necessary to determine both the nature of the alleged nuisance and whether state or federal law will be applied.

Under F.R.Civ.P. 15(a) leave to amend should be freely given. In determining whether plaintiffs may amend the court is to consider such factors as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the amendment [and] futility. . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The fact that the motion to amend may be subject to dismissal does not necessarily require that the court dismiss for futility. In *Brier v. Northern California Bowling Proprietors' Ass'n.*, 316 F.2d 787 (9th Cir. 1963) the court in refusing to speculate as to whether the amended complaint would be legally sufficient remarked "It has been said that the sufficiency of an amended pleading ordinarily will not be considered on motion for leave to amend." (citations omitted). 316 F.2d at 790. Only where the complaint "cannot under any conceivable state of facts be amended to state a claim" should the amendment be denied on the grounds of futility. 316 F.2d at 790. While the court does not at this juncture pass upon the ability of the amendment to survive a motion to dismiss, the amendment cannot be described as futile under the standard established in *Brier, supra.*

As to the Department's second argument that the amendment will add new issues of law and fact, it appears to the court inherent in the nature of amendment to add new theories of liability. Since the Department has not demonstrated, or even asserted that any of the bases for denial set out in *Foman, supra,* are present, the court hereby grants plaintiff leave to file its amended complaint.

MOTION TO SEVER OR SEPARATE

Audubon seeks a separate trial on the issues of its complaint or a severing of the complaint from the remainder of the action. Audubon states that a separate trial should be granted on a showing of convenience or to avoid prejudice. F.R.Civ.P. 42(b). Alternatively Audubon requests severance under Rule 21 asserting that the delay arising from pursuing the cross-complaint of the Department would foreclose relief. Further, Audubon states that such severance would avoid involving peripheral parties.

Whether either separation or severance would be appropriate in this action in turn rests upon a determination of the nature of the public trust rights that plaintiffs seek to assert. Accordingly, the court will defer a determination on these motions until the issues of the public trust doctrine discussed below are resolved.

PRELIMINARY INJUNCTION

Audubon also requests that this court set a date for hearing a motion for preliminary injunction. Plaintiffs have filed no motion for such relief. Therefore there is no basis for setting a hearing date. Plaintiffs' motion is denied.

MOTION OF THE STATE OF CALIFORNIA TO AMEND THE CROSS-COMPLAINT

The state has also moved to amend its pleadings to add a request for a declaration that the plaintiffs have no standing to maintain a claim in federal common law nuisance. That motion, being unopposed, is hereby granted.

MOTION OF THE DEPARTMENT TO DISMISS THE THIRD AND FOURTH CAUSES OF ACTION OF THE CROSS-COMPLAINT AND TO REMAND

The Department seeks to have the third and fourth causes of action dismissed under F.R.Civ.P. 41(a)(2), which permits dismissal upon order of the court "upon such terms and conditions as the court deems proper." Following the dismissal the Department seeks a remand of the action to the state court. The United States and Audubon have opposed the motion to dismiss, asserting that it is an attempt by the Department to "oust" the court of jurisdiction. Plaintiff Audubon further opposes the motion to dismiss on the grounds that the Department has given no reason to dismiss these claims and that the requirements of Rule 42(a) are therefore not met.

Both Audubon and the United States argue that should the motion to dismiss be granted that the court should exercise its jurisdiction to retain the action even though the "head of federal jurisdiction" is lost.

1. *Motion to Dismiss*

The terms of voluntary dismissal by the court after an opposing party has filed an answer or other opposition paper is controlled by F.R.Civ.P. 41 (a)(2) which provides in pertinent part: ". . . an action shall not be dismissed at

the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

Such motions to dismiss are within the discretion of the court. *Blue Mountain Construction Co. v. Werner*, 270 F.2d 305 (9th Cir. 1959). It has been observed that the reason for this rule is to avoid prejudice to the defendant and to insure substantial justice to both parties. Wright and Miller, *Federal Practice and Procedure* § 2364 pp. 169-170. The Department stated at oral argument in its earlier motion to remand and again during the hearings on these motions, that at least as to the third cause of action the Department had badly pled and was seeking to dismiss the claim at the time the action was removed to federal court. In an action as complex as this no purpose is served in retaining claims which no party seeks to act upon. Further, as will be discussed, the dismissal of these causes of action does not prejudice either the United States or Audubon in their attempt to pursue this action in federal court. The motion of the Department to dismiss the third and fourth causes of action is therefore granted.

2. *Motion to Remand*

Once the motion to dismiss is granted the Department asserts that the head of federal jurisdiction is lost and that the court should not go forward with the action, but rather should remand it to the state court. While the issue of the retention of pendant state claims by the federal court is both complex and interesting, the present posture of the action does not require the court to delve into subsequent interpretations of dicta in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *See Rosado v. Wyman*, 397 U.S. 397 (1970); *Arizona v. Cook*, 541 F.2d 226 (9th Cir.

1976); *Hodge v. Mountain States Telephone & Telegraph Co.*, 555 F.2d 254 (9th Cir. 1977). The amendment of plaintiffs' claim to add a cause of action in federal common law nuisance provides sufficient basis for the court to retain jurisdiction over the action. As stated by the United States Supreme Court in *Illinois v. Milwaukee*, 406 U.S. 91 (1972) "The question is whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a). We hold that it does; . . ." 406 U.S. at 99. The court therefore finds that the amended complaint does state a federal claim and remand is inappropriate.

ABSTENTION

While no party has specifically moved this court to abstain, the Department raises as a factor to be considered in the remand motion the fact that abstention is appropriate. The court therefore sua sponte raised the abstention issue and received further briefing on that issue from all parties. After due consideration, the court now determines that abstention is appropriate.

The complaint and cross-complaints filed in this action raise many difficult issues. One issue, central to this action, however, is the nature of the public trust doctrine. Plaintiffs seek to assert this doctrine as a right independent of the complex state water rights system. The state in its cross-complaint asserts that the doctrine is subsumed within the system established under the state Constitution, Article X, section 2. The characteristics of this central issue when examined in light of the policies of abstention compels the court to abstain.

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) the Supreme Court outlined the circumstances appropriate to abstention:[a] "cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." Citing inter alia *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959), *Railroad Comm's of Texas v. Pullman Co.*, 312 U.S. 496 (1941);[b] cases where federal jurisdiction has been invoked to restrain certain state criminal proceedings. *Younger v. Harris*, 401 U.S. 37 (1971)[c] "Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Citing *Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) and *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968). 424 U.S. at 814. In the present action the circumstances presented appear to fall within *Thibodaux*-type abstention.

Both the complaint and the cross-complaint by the state rely on interpretations of the California Constitution which have not been spoken to by the state courts. No state court issues could be more sensitive nor more appropriately determined by the state court than the interpretation of that state's own constitution. Plaintiffs argue that the state law questions are not novel in that the public trust doctrine is firmly established by state law. It is not the existence of the public trust doctrine that is at issue in this action but the interrelationship of that doctrine and the system of water rights provided for by the state constitution. The questions raised relative to this relationship have not been

addressed by any California court. The difficulty of dealing with issues relating to the water law system of the state has caused the California Supreme Court to remark "The scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented by the courts." *Environmental Defense Fund v. East Bay Utility District*, 20 Cal.3d 327, 344 (1977), vacated on other grounds, 439 U.S. 811 (1978).

Should plaintiffs prevail on their theory of the public trust, the result may be to limit the availability of water to present users. The public import of such a decision in a state whose most populated areas are quite arid cannot be doubted. Courts have recognized the importance of water to arid areas in numerous decisions. *See, e.g., Kaiser Steel, supra* at 594; *Chow v. City of Santa Barbara*, 317 Cal. 673, 702 (1933). In *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F.2d 555 (9th Cir. 1934), aff'd 295 U.S. 142 (1935), the Ninth Circuit stated: "The intensity of the public interest involved [in water] is indicated by the provisions in the constitutions and statutes of western states declaring the waters of natural streams and lakes to be the property of the public or of the state." 73 F.2d at 567.

The posture of this case is very similar to that of *Kaiser Steel, supra*, wherein the Supreme Court held per curiam that abstention was appropriate where the water rights issue raised required interpretation of the state constitution. This court therefore finds that this case raises novel and difficult issues of state law which bear on substantial public policy problems.

It must be noted by the court that at least one dissimilarity exists between this case and other cases which have

abstained under the *Thibodaux* rationale. In *Thibodaux* and *Kaiser Steel* the basis of federal jurisdiction was diversity. Here the jurisdictional basis is a federal question. Whether diversity is crucial to this form of abstention is entirely unclear to this court. The concurring opinion of Justice Brennan in *Kaiser Steel* refers to this form of abstention as abstention in diversity cases. 391 U.S. at 595. In dicta the Ninth Circuit has stated after listing the requirements of Pullman abstention, abstention is appropriate in other exceptional circumstances such as "diversity cases involving no federal question at all." *Canton v. Spokane School District #81*, 498 F.2d 840, 845, n.8 (9th Cir. 1974). The cases which actually apply this type of abstention do not assert that the jurisdictional basis is determinative and this court finds that the application of *Thibodaux*-type abstention in light of the presence of factors specifically referred to by the courts is appropriate.

ABSTENTION PROCEDURE

Depending upon the type of abstention adopted by the court, the resulting procedure will vary. The state has argued that this action comes under the provisions of *Burford* abstention as well as *Thibodaux* abstention and that therefore the court should dismiss the action.

In *Colorado, supra*, the court delineated the parameters of abstention where the state law questions bear on public policy to include actions where the exercise of federal jurisdiction "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and *Alabama Pub.Serv.Comm's v. Southern R.Co.*, 341 U.S. 341 (1951).

The state argues that the California water system is a complicated and comprehensive system of regulation and that for the federal court to determine that the public trust doctrine is independent of the state administrative system would disrupt that system. Thus, the state asserts *Burford*-type abstention is appropriate and dismissal required. The state's argument begs the question presented by the case. To determine at this point that a federal court resolution of the action would disrupt the administrative processes would be to determine that plaintiffs' theory of the action will prevail. In *Burford, supra,* the court abstained and dismissed because the administrative agency had undoubted jurisdiction over the questions to be litigated before the federal court. The basis of abstention was the presence of a comprehensive administrative and judicial process which unquestionably could resolve the dispute. Whether the administrative agency has jurisdiction over plaintiffs' action is central to this action. The court therefore determines that the policies controlling *Burford*-type abstention do not apply in this action and dismissal is inappropriate.

Another procedure employed by the courts where abstention is appropriate is certification to the state court. *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960). As pointed out by counsel for Audubon, no such procedure exists between the California and the federal courts. Necessarily that procedure will not be adopted by this court.

In *Thibodaux* and *Kaiser Steel* the court stayed the federal action to allow the state court to determine the issues in question through the use of declaratory relief. This approach appears appropriate in the present case. The court therefore stays this action with directions to the

parties to seek a determination of the interrelationship of the public trust doctrine and the state water rights system. The federal issue raised by the complaint will be addressed, if necessary, following the state court resolution of the public trust issue. The McCarren action brought by the Department of Water and Power is also stayed. Once a determination is made by the state court regarding the appropriate application of the public trust doctrine, this court will move forward on that claim as well.

Audubon has argued that staying this action and seeking declaratory relief from the state courts is inappropriate since the California courts do not render advisory opinions and an action for declaratory relief where the main suit is still before the federal court could be considered such an action. Admittedly Audubon has found no case in which the California courts have refused to proceed in such circumstances. In order that this action not be further delayed, the court additionally directs the parties to raise this issue before the state court as part of their request for declaratory relief.

The parties are directed to file copies of all proceedings in the state court with this court. In the event declaratory relief is not promptly sought from the state court, or if it cannot promptly be obtained, this court "having retained complete control of the litigation will doubtless assert it to decide [the issue upon which it has abstained]." 360 U.S. at 29. Because the court recognizes that the approach it now takes does not fall squarely within any of the abstention cases, this order is certified for immediate appeal to the Ninth Circuit under 28 U.S.C. § 1292(b).

IT IS THEREFORE ORDERED THAT:

1. Plaintiffs' motion to amend is granted;

2. Plaintiffs' motion to sever or separate is deferred;

3. Plaintiffs' motion for a hearing on the issue of a preliminary injunction is denied;

4. The motion of the state to amend is granted;

5. The motion of the Department to dismiss the third and fourth causes of action of its cross-complaint is granted;

6. The motion of the Department to remand is denied;

7. This action be stayed until either a determination on the public trust issues is made by the state court or until that court determines it cannot proceed on those issues; and

8. The parties are ordered to file Status Reports pursuant to Local Rule 125 in ninety (90) days. The court will determine at that time whether a Status Conference is appropriate.

DATED: January 16, 1981.

/s/ LAWRENCE K. KARLTON
U.S. District Judge

Intended Ruling on Motion for Summary Judgment, entered September 18, 1981 by Superior Court for Alpine County, California

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IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALPINE

No. 639

NATIONAL AUDUBON SOCIETY, et al.,
Plaintiffs,

vs.

DEPARTMENT OF WATER AND POWER OF
THE CITY OF LOS ANGELES, et al.,
Defendants.

[Filed Sept. 18, 1981]

INTENDED RULING ON MOTION FOR SUMMARY JUDGMENT

The Court intends to grant the motion for summary judgment of defendant State of California filed herein on May 8, 1981.

The plaintiffs have failed to state a cause of action. The California water rights system is a comprehensive and exclusive system for determining the legality of the diversions of the City of Los Angeles in the Mono Basin. Any use of appropriated water is subject to and conditional upon the statutory procedure. People v. Sherokow (1980) 26 Cal.3d 301, 306-309. The Public Trust Doctrine does not function independently of that system. This Court concludes that as regards the right of the City of Los Angeles

to divert waters in the Mono Basin that the Public Trust Doctrine is subsumed in the water rights system of the state.

Defendant City of Los Angeles argues that this Court may not proceed to rule on the exhaustion of administrative remedy issue as such would clearly be an advisory opinion unless and until plaintiffs amend and challenge the reasonable and beneficial use of the defendant City's diversions. Both the Federal Court and defendant State have requested this Court to proceed with the exhaustion issue. This Court intends to accommodate the Federal Court. This Court would of course grant a motion by plaintiffs to amend their pleadings so as to challenge the reasonable and beneficial use of the City's diversions. However even should plaintiffs choose to do so this Court would and does rule that plaintffs have not exhausted their administrative remedy. This issue is "ripe" for determination. Defendant State is alone in arguing this position. All of the other parties who argue this issue urge the Court to adopt a ruling that this Court has concurrent jurisdiction with the State Water Resources Control Board. However none of the other parties challenge the State's position that issues here are complex and transcendent. Consequently this Court must conclude that this is in fact so. Environmental Defense fund v. East Bay Muni Utility District (1980) 26 Cal.3d 183 holds that plaintiff would be required to exhaust their administrative remedy before the State Board where there is a direct challenge to appropriative rights. The State Board has exclusive jurisdiction over the granting and administration of such rights. This Court should defer in the first instance to the expertise of the appropriate administrative agency where the issues

are complex and transcendent. In addition to considerations of securing water from sources other than the Mono Basin the State Board will have to consider the issues of conservation and reclamation of waters after they reach Los Angeles. This Court intends to conclude that plaintiffs would be required to exhaust their administrative remedy either under a challenge based on an independent Public Trust claim or under the reasonable and beneficial use test.

The Court intends to deny plaintiffs' motion for summary judgment.

The attorneys for defendant State shall prepare the order.

DATED: Sept. 8, 1981

/s/ J. HILARY COOK
Judge of the Superior Court

Judgment Entered November 9, 1981 by
Superior Court for Alpine County, California

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IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALPINE

Civil No. 639

NATIONAL AUDUBON SOCIETY, a Corporation;
FRIENDS OF THE EARTH, a Corporation;
THE MONO LAKE COMMITTEE, a Corporation; and
THE LOS ANGELES AUDUBON SOCIETY,
a Corporation;
Plaintiffs,

v.

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES; STATE OF CALIFORNIA, CALIFORNIA STATE LANDS COMMISSION, and the CALIFORNIA WATER RESOURCES CONTROL BOARD,
Defendants.

DEPARTMENT OF WATER AND POWER
OF THE CITY OF LOS ANGELES,
Cross-Complainant,

v.

NATIONAL AUDUBON SOCIETY, a Corporation;
FRIENDS OF THE EARTH, a Corporation;
THE MONO LAKE COMMITTEE, a Corporation; and
THE LOS ANGELES AUDUBON SOCIETY,
a Corporation;
STATE OF CALIFORNIA, and
CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD,
Cross-Defendants.

[Filed Nov. 9, 1981]

JUDGMENT

The above matter having come for hearing on cross-motions for summary judgment on August 17, 1981, Judge J. Hilary Cook presiding; Palmer Brown Madden appearing as counsel for plaintiffs; Adolph Moskovitz and Kenneth Downey appearing as counsel for defendant Department of Water and Power of the City of Los Angeles; Roderick E. Walston appearing as counsel for defendants State of California, *et al.*; Arthur L. Littleworth appearing as counsel for intervenors June Lake Public Utilities District, *et al.*; Jennifer Moran appearing as counsel for Southern California Edison Company; and Stuart Somach appearing as counsel for intervenor United States; the court having heard the arguments and considered the briefs, exhibits, declarations and other documents filed herein; and good cause appearing therefore, the court now renders its judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) The complaint of plaintiffs National Audubon Society, *et al.* shall be, and the same is hereby, dismissed with prejudice;

(2) The cross-complaint of cross-complainant Department of Water and Power of the City of Los Angeles shall be, and the same is hereby, dismissed without prejudice;

(3) Judgment shall be, and the same is hereby, granted in favor of defendants, and against plaintiffs; and

(4) The defendants shall recover their costs of suit herein.

DATED: November 9, 1981

/s/ J. HILARY COOK
Judge, Superior Court

Judgment has been entered this day in the above-entitled case in Judgment Book Volume C, page 138.

DATED: November 9, 1981

By /s/ JOAN G. CHACON
Clerk, Alpine County

California Constitution
Article X, Section 2

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

Selected Sections of California Water Code Relating to Appropriative Water Rights

102. All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.

106. It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.

106.5. It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses, but that no municipality shall acquire or hold any right to waste water, or to use water for other than municipal purposes, or to prevent the appropriation and application of water in excess of its reasonable and existing needs to useful purposes by others subject to the rights of the municipality to apply such water to municipal uses as and when necessity therefor exists.

109(a). The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights. It is

hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import.

1201. All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance wtih the provisions of this code.

1240. The appropriation must be for some useful or beneficial purposes, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.

1241. When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, such unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water. Such reversion shall occur upon a finding by the board following notice to the permittee and a public hearing if requested by permittee.

1243. The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public

interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources.

The board shall notify the Department of Fish and Game of any application for a permit to appropriate water. The Department of Fish and Game shall recommend the amounts of water, if any, required for the preservation and enhancement of fish and wildlife resources and shall report its findings to the board.

This section shall not be construed to affect riparian rights.

1243.5. In determining the amount of water available for appropriation, the board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses, including any uses specified to be protected in any relevant water quality control plan established pursuant to Division 7 (commencing with Section 13000) of this code.

This section shall not be construed to affect riparian rights.

1252. Any person may apply for and secure from the board, in conformity with this part and in conformity with reasonable rules and regulations adopted from time to time by it, a permit for any unappropriated water.

1253. The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.

1254. In acting upon applications to appropriate water the board shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water.

1255. The board shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest.

1257. In acting upon applications to appropriate water, the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan, and (2) the reuse or reclamation of the water sought to be appropriated, as proposed by the applicant. The board may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated.

1350. The board may grant, or refuse to grant a permit and may reject any application, after hearing.

1380. Upon the approval of an application the board shall issue a permit.

1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division, but no longer.

1394. The board may reserve jurisdiction in whole or in part to amend, revise, supplement, or delete terms

and conditions in a permit under either of the following circumstances.

(a) If the board finds that sufficient information is not available to finally determine the terms and conditions which will reasonably protect vested rights without resulting in waste of water or which will best develop, conserve, and utilize in the public interest the water sought to be appropriated, and that a period of actual operation will be necessary in order to secure the required information.

(b) If the application or applications being acted upon represent only part of a co-ordinated project, other applications for such project being pending, and the board finds that the co-ordinated project requires co-ordinated terms and conditions which cannot reasonably be decided upon until decision is reached on said other pending applications.

Jurisdiction shall be reserved under this section for no longer period of time than the board finds to be reasonably necessary, and in no case shall such jurisdiction be exercised after the issuance of the license. Such reserved jurisdiction shall be exercised only after notice to the parties and a hearing. The board's decision or order reserving jurisdiction and the board's decision or order in the exercise of its reserved jurisdiction shall both be subject to reconsideration by the board and judicial review as authorized in this part.

1410. If the board finds that the work is not commenced, prosecuted, and completed, or the water applied to beneficial use as contemplated in the permit and in accordance with this division and the rules and regulations of the

board, the board shall, after notice in writing and mailed in a sealed, postage prepaid and registered letter addressed to the permittee at his last known address, and after a hearing, when a hearing is requested by the permittee pursuant to Section 1410.1, revoke the permit and declare the water subject to further appropriation.

1425.

(a) When the board finds that an applicant has an urgent but only temporary need to divert and use water for a period not to exceed six months, and that such water may be diverted and used without injury to any lawful user of water, and without unreasonable effect upon fish, wildlife, or other instream beneficial uses, the board may issue to the applicant a conditional, temporary permit, without requiring compliance with other procedures or provisions of this division, but subject to all requirements of this chapter.

(b) When the board finds that a person who is an applicant for a permit under the provisions of this division other than this chapter has a need to divert and use water under unforeseen emergency conditions, and that such water may be diverted and used without injury to any lawful user of water, and without unreasonable effect upon beneficial uses, the board may issue to such person, upon application made pursuant to this chapter, a conditional, temporary permit, without requiring compliance with other procedures or provisions of this division, but subject to all requirements of this chapter.

(c) No temporary permit may be issued pursuant to the provisions of this chapter unless it is first de-

termined that unappropriated water is available and that the diversion and use could not adversely affect the rights of downstream users. The board may delegate to any employee of the board all or any of its functions under this chapter; provided, that the board shall, at its next regular meeting, review and validate any temporary or emergency permit issued by an employee.

(d) "Unforeseen emergency conditions," for the purposes of this section, shall be found to exist when there have been unexpected circumstances requiring immediate action by an applicant to divert and use water so as to protect the public health, welfare, or safety. It is not necessary that the emergency conditions be such that they could not have been anticipated or prepared for but only that in the normal course of events they would seldom be expected.

1429. The board shall supervise appropriation of water under the temporary permit for the protection of vested rights and instream beneficial uses and for compliance with permit conditions.

1430. Any temporary permit issued under this chapter shall not result in creation of a vested right, even of a temporary nature, but shall be subject at all times to modification or revocation in the discretion of the board. Any temporary permit shall automatically expire 180 days after the date of its issuance, unless an earlier date is specified or it has been revoked.

1450. Any application properly made gives to the applicant a priority of right as of the date of the application

until such application is approved or rejected. Such priority continues only so long as the provisions of law and the rules and regulations of the board are followed by the applicant.

1455. The issuance of a permit continues in effect the priority of right as of the date of the application and gives the right to take and use the amount of water specified in the permit until the issuance of a license for the use of the water or until the permit is revoked.

1600. Immediately upon completion of the construction of works and application of the water to beneficial use the permittee shall report the completion to the board.

1610. If the determination of the board as to completion is favorable to the permittee, the board shall issue a license which confirms the right to the appropriation of such an amount of water as has been determined to have been applied to beneficial use.

1611. If the board determines that the construction and condition of the works or the use of water therefrom are not in conformity with the law, the rules and regulations of the board, or the terms of the permit, it may revoke the permit in the manner provided in Article 5 (commencing with Section 1410) of Chapter 6 of this part. The board may in its discretion allow a reasonable time for the permittee to correct discrepancies in the works or use of water before taking action to revoke the permit.

1627. A license shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division but no longer.

1675. If at any time after a license is issued, the board finds that the licensee has not put the water granted under the license to a useful or beneficial purpose in conformity with this division or that the licensee has ceased to put the water to such useful or beneficial purpose, or that the licensee has failed to observe any of the terms and conditions in the license, the board, after due notice to the licensee and after a hearing, when a hearing is requested by the licensee pursuant to Section 1675.1, may revoke the license and declare the water to be subject to appropriation in accordance with this part. As used in this section "licensee" includes the heirs, successors, or assigns of the licensee.

License for Diversion and Use of Water No. 10191
Issued by California State Water Resources Control Board
to City of Los Angeles Department of Water & Power

State of California
The Resources Agency
State Water Resources Control Board
Division of Water Rights

[Seal]

LICENSE FOR DIVERSION AND USE OF WATER

Application 8042 Permit 5555 License 10191

THIS IS TO CERTIFY, *That*

City of Los Angeles, Department of Water and Power
c/o General Manager and Chief Engineer,
P. O. Box 111, Los Angeles, California 90051

has made proof as of May 2, 1973 (the date of inspection) to the satisfaction of the State Water Resources Control Board of a right to the use of the water of (1) Leevining Creek (2) Walker Creek (3) Parker Creek and (4) Rush Creek in Mono County tributary to (1)(4) Mono Lake and (2)(3) Rush Creek thence Mono Lake for the purpose of Municipal Use under Permit 5555 of the Board and that the right to the use of this water has been perfected in accordance with the laws of California, the Regulations of the Board and the permit terms; that the priority of this right dates from July 27, 1934 and that the amount of water to which this right is entitled and hereby confirmed is limited to the amount actually beneficially used for the stated purposes and shall not exceed (a) One Hundred Eighty-nine (189) cubic feet per second by direct diversion, to be di-

verted from January 1 to December 31 of each year; and (b) Eighty-nine Thousand Two Hundred (89,200 acre-feet per annum by storage, to be collected in Grant Lake, Long Valley, Tinemaha and Haiwee reservoirs from January 1 to December 31 of each year as follows:

(1) LeeVining Creek—83 cubic feet per second and 32,000 acre-feet per annum

(2) Walker Creek—6 cubic feet per second and 4,700 acre-feet per annum

(3) Parker Creek—11.9 cubic feet per second and 5,800-acre-feet per annum

(4) Rush Creek—88.1 cubic feet per second and 46,700 acre-feet per annum

The maximum withdrawal from storage in any one year shall not exceed a total of 69,100 acre-feet.

The total amount of water to be taken from the sources shall not exceed 167,800 acre-feet per calendar year of January 1 to December 31. The total amount to be placed to beneficial use shall not exceed 147,700 acre-feet per calendar year of January 1 to December 31.

The maximum rate of diversion to offstream storage shall not exceed 365 cubic feet per second.

The points of diversion of such water are located:

(1) South 75° West 3,400 feet from NE corner of Section 20, T1N, R26E, MDB&M, being within NE¼ of NW¼ of said Section 20.

(2) South 86°13'27" East 268.78 feet from NW corner of Section 4, T1S, R26E, MDB&M, being within NW¼ of NW¼ of said Section 4.

(3) South 34°43'02" East 2,055.91 feet from NW corner of Section 9, T1S, R26E, MDB&M, being within SW¼ of NW¼ of said Section 9, and

(4) South 7°24'00" East 1,256.8 feet from NW corner of Section 15, T1S, R26E, MDB&M, being within NW¼ of NW¼ of said Section 15

The points of rediversion of such water are located:

Grant Lake—South 9°47'26" East 1,898.09 feet from NW Corner of Section 15, T1S, R26E, MDB&M, being within SW¼ of NW¼ of said Section 15,

Long Valley Reservoir—North 48°13'14" West 4,199.2 feet from old post in mount of rock at SE Corner of Section 19, T4S, R30E, MDB&M, being within SE¼ of NW¼ of said Section 19,

Tinemaha Reservoir—South 34°52'00" West 703.81 feet from N¼ Corner of Section 26, T10S, R34E, MDB&M, being within NE¼ of NW¼ of said Section 26,

Los Angeles Aqueduct Intake—South 40°43'40" West 5,040.54 feet from NE Corner of Section 24, T11S, R34E, MDB&M, being within NE¼ of SW¼ of said Section 24, and

Haiwee Reservoir—North 44°59'00" East 3,946.56 feet from SW Corner of projected Section 2, T21S, R37E, MDB&M, being within SW¼ of NE¼ of said Section 2.

A description of lands or the place where such water is put to beneficial use is as follows:

Within the service area of the Department of Water and Power, City of Los Angeles, as shown on map filed with State Water Resources Control Board.

Licensee shall allow representatives of the Board and other parties, as may be authorized from time to time by the Board, reasonable access to project works to determine compliance with the terms of this license.

All rights and privileges under this license, including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

Reports shall be filed promptly by licensee on appropriate forms which will be provided for the purpose from time to time by the Board.

The right hereby confirmed to the diversion and use of water is restricted to the point or points of diversion herein specified and to the lands or place of use herein described.

This license is granted and licensee accepts all rights herein confirmed subject to the following provisions of the Water Code:

Section 1625. Each license shall be in such form and contain such terms as may be prescribed by the Board.

Section 1626. All licenses shall be under the terms and conditions of this division (of the Water Code).

Section 1627. A license shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code) but no longer.

Section 1628. Every license shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a license is issued takes the license subject to the conditions therein expressed.

Section 1629. Every licensee, if he accepts a license does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any license granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any licensee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivison of the State, of the rights and property of any licensee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Section 1630. At any time after the expiration of twenty years after the granting of a license, the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State shall have the right to purchase the works and property occupied and used under the license and the works

built or constructed for the enjoyment of the rights granted under the license.

Section 1631. In the event that the State, or any city, city and county, municipal water district, irrigation district, lighting district, or political subdivision of the State so desiring to purchase and the owner of the works and property cannot agree upon the purchase price, the price shall be determined in such manner as is now or may hereafter be provided by law for determining the value of property taken in eminent domain proceedings.

Dated: Jan. 25, 1974.

STATE WATER RESOURCES
CONTROL BOARD

/s/ K. L. Woodward
Chief, Division of Water Rights

License for Diversion and Use of Water No. 10192
Issued by California State Water Resources Control Board
to City of Los Angeles Department of Water & Power

State of California
The Resources Agency
State Water Resources Control Board
Division of Water Rights

[Seal]

LICENSE FOR DIVERSION AND USE OF WATER

Application 8043 Permit 5556 License 10192

THIS IS TO CERTIFY, *That*

City of Los Angeles, Department of Water and Power
c/o General Manager and Chief Engineer,
P. O. Box 111, Los Angeles, California 90051

has made proof as of May 2, 1973 (the date of inspection) to the satisfaction of the State Water Resources Control Board of a right to the use of the water of (1) Leevining Creek (2) Walker Creek (3) Parker Creek and (4) Rush Creek in Mono County tributary to (1)(4) Mono Lake and (2)(3) Rush Creek thence Mono Lake for the purpose of Power use under Permit 5556 of the Board and that the right to the use of this water has been perfected in accordance with the laws of California, the Regulations of the Board and the permit terms; that the priority of this right dates from July 27, 1934 and that the amount of water to which this right is entitled and hereby confirmed is limited to the amount actually beneficially used for the stated purposes and shall not exceed (a) Two Hundred (200) cubic feet per second by direct diversion, to be diverted from January 1 to December 31 of each year; and (b) Seventy

Thousand Two Hundred (70,200) acre-feet per annum by storage, to be collected in Grant Lake and Long Valley reservoirs from January 1 to December 31 of each year as follows:

(1) LeeVining Creek—87.8 cubic feet per second and 26,500 acre-feet per annum

(2) Walker Creek—7.2 cubic feet per second and 3,600 acre-feet per annum

(3) Parker Creek—12.6 cubic feet per second and 4,400 acre-feet per annum

(4) Rush Creek—93.2 cubic feet per second and 35,700 acre-feet per annum

The maximum withdrawal from storage in any one year shall not exceed a total of 44,900 acre-feet.

The maximum rate of diversion to offstream storage shall not exceed 365 cubic feet per second.

The total amount of water diverted under this license and any license issued pursuant to Application 8042 shall not exceed 200 cubic feet per second by direct diversion and 89,200 acre-feet per annum by storage.

The points of diversion of such water are located:

(1) South 75° west 3,400 feet from NE corner of Section 20, T1N, R26E, MDB&M, being within NE¼ of NW¼ of said Section 20,

(2) South 86°13'27" East 268.78 feet from NW corner of Section 4, T1S, R26E, MDB&M, being within NW¼ of NW¼ of said Section 4,

(3) South 34°43'02" East 2,055.91 feet from NW corner of Section 9, T1S, R26E, MDB&M, being within SW¼ of NW¼ of said Section 9, and

(4) South 7°24'00" East 1,256.8 feet from NW corner of Section 15, T1S, R26E, MDB&M, being within NW¼ of NW¼ of said Section 15.

The points of rediversion of such water are located:

Grant Lake—South 9°47'26" East 1,898.09 feet from NW Corner of Section 15, T1S, R26E, MDB&M, being within SW¼ of NW¼ of said Section 15,

Long Valley Reservoir—North 48°13'14" West 4,199.2 feet from old post in mound of rock at SE Corner of Section 19, T4S, R30E, MDB&M, being with SE¼ of NW¼ of said Section 19,

Upper Gorge Power Plant—North 47°04'14" East 5,612 feet from rock mound at SW Corner of Section 5, T5S, R31E, MDB&M, being within SE¼ of NE¼ of said Section 5, and

Middle Gorge Power Plant—North 61°10'53" East 2,542.88 feet from rock mound at ¼ Section Corner on South Line of Section 16, T5S, R31E, MDB&M, being within SE¼ of SE¼ of said Section 16.

A description of lands or the place where such water is put to beneficial use is as follows:

Upper Gorge Power House—within SE¼ of NE¼ of Section 5, T5S, R31E, MDB&M

Middle Gorge Power House—within SE¼ of SE¼ of Section 16, T5S, R31E, MDB&M

Control Gorge Power House—within NW¼ of SE¼ of Section 10, T6S, R31E, MDB&M

Water will be discharged into the Owens River within NW¼ of SE¼ of Section 10, T6S, R31E, MDB&M.

Licensee shall allow representatives of the Board and other parties, as may be authorized from time to time by the Board, reasonable access to project works to determine compliance with the terms of this license.

All rights and privileges under this license, including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

Reports shall be filed promptly by licensee on appropriate forms which will be provided for the purpose from time to time by the Board.

The right hereby confirmed to the diversion and use of water is restricted to the point or points of diversion herein specified and to the lands or place of use herein described.

This license is granted and licensee accepts all rights herein confirmed subject to the following provisions of the Water Code:

Section 1625. Each license shall be in such form and contain such terms as may be prescribed by the Board.

Section 1626. All licenses shall be under the terms and conditions of this division (of the Water Code).

Section 1627. A license shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code) but no longer.

Section 1628. Every license shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a license is issued takes the license subject to the conditions therein expressed.

Section 1629. Every licensee, if he accepts a license does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any license granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any licensee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivison of the State, of the rights and property of any licensee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Section 1630. At any time after the expiration of twenty years after the granting of a license, the State or any city,

city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State shall have the right to purchase the works and property occupied and used under the license and the works built or constructed for the enjoyment of the rights granted under the license.

Section 1631. In the event that the State, or any city, city and county, municipal water district, irrigation district, lighting district, or political subdivision of the State so desiring to purchase and the owner of the works and property cannot agree upon the purchase price, the price shall be determined in such manner as is now or may hereafter be provided by law for determining the value of property taken in eminent domain proceedings.

Dated: Jan. 25, 1974.

STATE WATER RESOURCES
CONTROL BOARD

/s/ K. L. WOODWARD
Chief, Division of Water Rights

No. 83-300

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES
DEPARTMENT OF WATER AND POWER,
Petitioner,

vs.

NATIONAL AUDUBON SOCIETY, a corporation;
FRIENDS OF THE EARTH, a corporation;
THE MONO LAKE COMMITTEE, a corporation;
and the LOS ANGELES AUDUBON SOCIETY, a corporation,
Respondents.

BRIEF OF RESPONDENTS STATE OF CALIFORNIA, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS STATE OF CALIFORNIA, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This brief is filed by respondents State of California, the State Water Resources Control Board, and the State Lands Commission. All said respondents were parties below, Pet. for Cert. i, and hence are respondents in this action. Rule 19.6, Rules of the Supreme Court.

1. The Historical Backdrop

This case arises against the historical backdrop of western water law development. Long ago, in response to arid conditions prevailing in the West, the western states

adopted the doctrine of "prior appropriation" as their basic water rights law. See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-752 (1950); *Jennison v. Kirk*, 98 U.S. 453, 456-459 (1878); 1 Wiel, *Water Rights in the Western States* 65-172 (3d ed. 1911). This doctrine replaces or modifies the riparian doctrine that prevailed under the English common law and that exists in most eastern states.[1] Under the appropriation doctrine, a water right exists to the extent that, and so long as, water is put to "reasonable and beneficial use" by the appropriator. *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983); *Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.*, 3 Cal.2d 489, 567-568 (1935); Trelease, "The Concept of Reasonable Beneficial Use in the Law of Surface Streams," 12 *Wyo. L.J.* 1, 14-17 (1956). The appropriation doctrine, which originated as a custom among the early miners, has been constitutionally or statutorily codified in the laws of all western states. See 1 Hutchins, *Water Rights Laws in the Nineteen Western States* 206-225 (1971 ed.). It is the fundamental doctrine of water law prevailing in the West today.

In 1913, the California Legislature codified the appropriation doctrine by enacting the California Water Commission Act, Cal. Water Code §§ 1200 *et seq.* This Act establishes the "reasonable and beneficial use" test as the measure of water rights, and creates a State agency—now known as the State Water Resources Control Board ("Water Board")—to administer the water rights system.

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[1]Some western states, such as California, have mixed water law doctrines, in that they recognize both appropriative and riparian rights. See 1 Hutchins, *Water Rights Laws in the Nineteen Western States* 192-200 (1971 ed.).

The California Supreme Court held in 1926 that the "reasonable and beneficial use" test does not apply to riparian rights in competition with appropriative rights. *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81 (1926). In 1928, the people of California overrode the *Herminghaus* decision by enacting a constitutional amendment, now contained at Article X, Section 2 of the California Constitution, that establishes the "reasonable and beneficial use" test as the measure of *all* water rights in California, whether appropriative, riparian, or other. See *Joslin v. Marin Muni. Water Dist.*, 67 Cal.2d. 132, 138 (1967); *Peabody v. City of Vallejo*, 2 Cal.2d 351, 367 (1935). Additionally, the constitutional amendment provides that the Legislature shall adopt laws "in furtherance of the policy" contained in the amendment. The constitutional amendment, in conjunction with the California Water Commission Act, establishes a comprehensive water rights system in California.

2. The Instant Controversy

In 1934, the Los Angeles Department of Water and Power ("DWP") applied to the Water Board's predecessor for permits to appropriate water from Mono Lake basin for domestic use in DWP's service area. The permits were granted in 1940. In granting the permits, the Water Board determined that, since domestic water uses at that time were entitled to the highest priority under California water law, it lacked authority to balance Mono Lake's ecological values against DWP's domestic needs.[2] The Water

[2]In the mid-1950's the California Water Code was substantially amended to authorize the Water Board, in granting water rights, to weigh and consider instream values—such as recreation and biological needs—in relation to consumptive use needs, and to grant

Board subsequently granted apropriative licenses to DWP in 1974, after DWP had built the diversion works and fully applied the water diversions to DWP's service area.

In 1981, the National Audubon Society ("Audubon") brought an action in a California court against DWP and the State of California, *et al.* ("State"), seeking a declaration, *inter alia*, with respect to the question whether the public trust doctrine can be invoked in actions involving review of DWP's licenses and permits.[2] Audubon argued that the public trust doctrine prohibits DWP from diverting water from Mono Lake basin to the detriment of

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such rights only if they are in the "public interest." Cal. Water Code §§ 1253, 1255, 1257. Pursuant to this authority, the Water Board now fully weighs and considers environmental values in issuing water rights permits. See, *e.g.*, *California v. United States*, 438 U.S. 645, 652 n. 7 (1978); *Environmental Defense Fund v. East Bay Muni. Util. Dist.*, 26 Cal.3d 183, 198 (1980).

[2]In 1979, Audubon filed an earlier action against DWP in a California court, alleging that the public trust doctrine, in itself, bars DWP from diverting water from Mono Lake basin that impairs public trust valuer in the basin. DWP filed a cross-complaint naming 117 cross-defendants who claimed water rights in Mono Lake basin. The cross-defendants included the State of California—named in its capacity as trustee of the public trust and administrator of the State water rights system—and the United States, which holds water rights in Mono Lake basin. The United States removed the action to federal court. The federal court, *sua sponte*, abstained from determining (1) the relationship between the public trust doctrine and the California water rights laws and (2) whether Audubon is required to exhaust its administrative remedies before the Water Board. Pet. App. 61. Audubon then brought another action in the State courts for declaratory judgment with respect to these two issues, and the California Supreme Court ultimately decided these issues. With respect to the second issue, the California Supreme Court held that the plaintiffs are not required to exhaust their administrative remedies before the Water Board.

ecological values in the basin, even though the diversions are authorized by water rights permits and licenses issued under California water rights laws. In reply, DWP argued that the public trust doctrine cannot be invoked to challenge DWP's water rights, because the water rights laws provide the exclusive measure of water rights and the sole remedy for challenging such rights. According to DWP, the water rights laws provide DWP with a "vested" water right and thus do not authorize reconsideration of DWP's rights in light of modern public needs. The State agreed with DWP that the water rights laws provide the exclusive measure of, and sole basis for challenging, water rights in California. The State argued, however, that the water rights laws incorporate the public trust doctrine, thus requiring the State to consider public trust values in determining the "reasonable and beneficial use" of water. The State also argued that the constitutionally-mandated "reasonable and beneficial use" test, both by its own force and by incorporating the public trust doctrine, authorizes the State to reconsider DWP's water rights in light of changing public needs.

3. The Lower Decision

The California Supreme Court ruled that the public trust doctrine can be invoked to challenge DWP's licenses and permits. 33 Cal.3d 419 (1983); Pet. App. 1-58. The Court, describing the effect of the public trust doctrine in the water rights context, stated:

> (a) The State "as sovereign retains continuing supervisory control" over navigable waters, thus preventing permittees and licensees "from acquiring vested rights" in such waters;

(b) The State, through the Legislature or the Water Board, has the right to authorize water diversions that impair public trust uses;

(c) The State must "take the public trust into account" in granting water rights, and must "protect public trust uses whenever feasible;" and

(d) The State, after granting water rights, has "a duty of continuing supervision" over the rights, and "is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." Pet. App. 39-41.

In effect, the lower decision holds that the public trust doctrine allows the State to reconsider DWP's water rights in light of current public needs, and requires the State to "consider" public trust values in granting water rights and to protect such values where "feasible." The decision also holds that, as a result of the "reasonable and beneficial use" test contained in the California Constitution, "all uses of water, including public trust uses, must now conform to the standard of reasonable use." Pet. App. 35. Thus, in effect, the decision holds that the public trust doctrine is incorporated in the constitutional test.

SUMMARY OF ARGUMENT

I

In California's view, the primary issue posed in the petition is whether the California Supreme Court decision gives rise to federal issues over which this Court has jurisdiction. The petitioner, asserting that the decision gives rise to federal issues, argues that the decision relies primarily on this Court's decision in *Illinois Central R.R. Co. v. Illinois*,

146 U.S. 387 (1892), which, according to the petitioner, decides issues of federal law. In California's view, the lower decision resolves issues of California law only, and relies on *Illinois Central* only as articulating principles that apply under California law. Since the lower decision resolves issues of California law, this Court lacks jurisdiction to review the decision to that extent.

II

The petitioner also argues that the lower decision, by holding that the petitioner's water uses are subject to modification under the public trust doctrine, deprives the petitioner of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. The question posed is whether the petitioner has vested "property" rights within the meaning of the Fourteenth Amendment, not whether its rights have been unconstitutionally "taken." This Court has consistently held that the definition of constitutionally-protectible "property" interests depends solely on state law, subject only to the qualification that state law must rest on a "fair or substantial basis."

The decision, as respondents State of California, *et al.*, interpret it, rests on a "fair or substantial basis." The decision holds that the public trust doctrine is incorporated in California's constitutional water rights system, in the sense that public trust values are considered in relation to other values in determining the "reasonable and beneficial use" of water. In past decisions, the California Supreme Court has held that the "reasonable and beneficial use" test is the measure of water rights in California, that the test

applies to all water rights in California, and that the test affords a basis for reconsidering water rights on the basis of changing public needs. Thus, the lower decision, by holding that public trust values must be considered within rather than outside the framework of this constitutional system, rests on a "fair or substantial basis."

ARGUMENT

I

THE CALIFORNIA SUPREME COURT DECISION IS BASED ON CALIFORNIA LAW RATHER THAN FEDERAL LAW, AND THIS COURT THUS LACKS JURISDICTION TO REVIEW THE DECISION

The decision below holds that, as a matter of State law, the public trust doctrine provides a basis for review of permits and licenses granted under State water rights laws, and thus that the State can revoke or modify such permits or licenses as necessary for the protection of changing public needs. The immediate question is whether the decision gives rise to federal issues over which this Court has jurisdiction. This Court lacks jurisdiction to review State court decisions based on adequate non-federal grounds, since any resulting opinion would be advisory and hence beyond the Court's jurisdiction. See, *e.g.*, *Fox Film Corp. v. Muller*, 274 U.S. 651 (1927). Since the decision here is based on adequate non-federal grounds, this Court lacks jurisdiction to review it.

The petitioner argues that the lower decision rests primarily on this Court's decision in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), and that *Illinois Central*

adopted federal common law. Pet. for Cert. 18-23. Indeed, the petitioner notes that the lower decision cites *Illinois Central* as the "primary authority" for the public trust doctrine. *Id.*, at 18; Pet. App. 24. In effect, the petitioner argues that the lower decision is based on, but misinterprets and misapplies, the federal common law.

In California's view, the lower decision is based on California law rather than federal law, and the decision relies on *Illinois Central* only as articulating principles that are incorporated in California law. The case reached the California Supreme Court only after a federal court abstained from considering the public trust issues. The federal abstention order was based on the fact that the case involved important issues of *California* law that should be initially determined by the courts of California. It is inconceivable that the federal district court would have abstained if the case had not raised important state issues. And, the California Supreme Court clearly understood that, as a result of the federal abstention order, the Court was deciding issues of California law. According to the Court, the federal district court abstained with respect to "two important issues of California law," Pet. App. 15, one of which was the relationship of the public trust doctrine and the California water rights system. The Court also commented that the federal abstention order allowed the California courts "to decide unsettled questions of California law . . . ." Pet. App. 16 n. 14.

Further, the lower decision's substantive analysis strengthens the conclusion that the California court was deciding issues of California law. The decision declares that its objective is to reach an "accommodation" between

the public trust doctrine and the State water rights laws. *Id.*, at 39. After analysis of both legal doctrines, the decision concludes that the doctrines "are parts of an integrated system of water laws." *Id.*, at 50. If the public trust doctrine were based on federal law rather than California law, the California Supreme Court surely would have ruled that federal law preempts California law, and would not have reached an "accommodation" that results in an "integrated" water law system. Finally, the decision, in analyzing the public trust doctrine, expressly describes the doctrine "in California," *id.*, at 18, and relies largely on California cases describing the effect of the doctrine, *id.*, at 19-23, 26-30. Indeed, the decision notes that earlier decisions of the California Supreme Court "indorsed the *Illinois Central* principles," *id.*, at 26, thus indicating that these earlier decisions did not consider that *Illinois Central* had a preemptive effect on California law.

Therefore, the lower decision articulates principles of California law rather than federal law, and, to this extent, this Court lacks jurisdiction to review the decision.

II

THE LOWER DECISION DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTY OF DUE PROCESS OF LAW

DWP argues that the lower decision, by holding that DWP's rights can be reconsidered under the public trust doctrine, deprives DWP of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Pet. for Cert. 23-27. The Fourteenth Amendment provides that a person cannot be "deprived" of "property" without due process of law, and the Fifth Amendment provides that "private property" cannot

be "taken" without payment of compensation. See, *e.g.*, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-124 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). DWP's argument is based solely on the Fourteenth Amendment, not the "taking" clause of the Fifth Amendment.

A. Standing

It is questionable whether a city has standing to argue that state action results in a deprivation of property without due process of law. In *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), this Court held that municipalities cannot assert due process claims against state legislative acts. The petitioners, without citing any authority, attempt to distinguish *Trenton* on grounds that the present case involves state judicial rather than legislative action. Pet. for Cert. 26 n. 9. This may be a distinction without a difference. But see *Board of Education v. Allen*, 392 U.S. 236 (1968); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1041-1042 (1980) (White, J., dissenting).

B. Ripeness

In conventional due process cases, it is assumed that "property" rights exist, and the question is whether such rights have been "taken" without due process of law. In determining the "taking" issue, this Court balances the "economic impact of the regulation," particularly in terms of whether the regulation "has interfered with distinct investment-backed expectations," against the "character of the government action." *Penn Central*, 438 U.S. at 124;

Kaiser Aetna, 444 U.S. at 174-175. It is impossible to determine the "economic impact" of the lower decision upon DWP's licenses and permits, since the decision merely subjects them to reconsideration and does not actually result in a diminution of them. Hence, it is premature to consider the "taking" issue at this time. See *Agins v. City of Tiburon*, 447 U.S. 255, 262-263 (1980).

DWP, however, does not assert that its rights have been unconstitutionally "taken" within the meaning of the Fifth Amendment. Rather, it asserts that the lower decision, by subjecting DWP's rights to reconsideration under the public trust doctrine, improperly defines DWP's "property" interests within the meaning of the Fourteenth Amendment. Thus, the issue is the nature of DWP's "property" rights, not whether its rights have been unconstitutionally "taken." Although it is clearly premature to determine the taking issue, since the "economic impact" on DWP's rights has not yet been determined, it is less clear whether it is premature to determine the nature of DWP's "property" interests within the meaning of the Fourteenth Amendment. Although, as we explain below, the petition does not appear to give rise to a cognizable due process issue, it may be appropriate for the Court to defer consideration of any such issue until DWP's rights are actually diminished, if they are diminished at all.

C. Merits

This Court has consistently held that the states are free to develop and apply their own rules of property, and thus to define the nature of "property" interests in navigable waters and underlying soils. See, *e.g.*, *Hardin v. Jordan*,

140 U.S. 371, 382-383 (1891); *Barney v. Keokuk*, 94 U.S. 324, 338 (1877); *Shively v. Bowlby*, 152 U.S. 1, 14, 18-26, 57-58; *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 654 (1927). Thus, although the Due Process Clause limits the extent to which states can impair "property" rights, state law determines whether the complainant has "property" within the meaning of that clause. The only limitation is that state law, in defining "property," must rest on a "fair or substantial basis" so that there is "no evasion of the constitutional issue." See *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944); *Broad River Co. v. South Carolina* ex rel. *Daniel*, 281 U.S. 537, 540 (1930); *Fox River*, 274 U.S. at 655.

The lower decision rests on a "fair or substantial basis." The decision holds that the public trust doctrine is incorporated in the "reasonable and beneficial use" test established under Article X, Section 2 of the California Constitution. Under this result, public trust values, such as navigation and fisheries, are not considered in a vacuum. Rather, they are considered in relation to other values, such as economic and municipal values, in determining whether a particular water use is "reasonable and beneficial." Indeed, the decision expressly states that, as a result of the constitutional test, "all uses of water, including public trust uses, must now conform to the standard of reasonable use." Pet. App. 35. Such a standard cannot be characterized as an unconstitutional redefinition of property rights. See *Cherry v. Steiner*, 543 F.Supp. 1270 (D.Ariz. 1982).

In several prior cases, the California Supreme Court has held that the constitutionally-mandated "reasonable

and beneficial use" test is the "measure of a water right" in California. See *Joslin v. Marin Muni. Water Dist.*, 67 Cal.2d 132, 138 (1967); *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 367 (1935). The Court has also held that the "reasonable and beneficial use" test affords a basis for reconsidering water rights. See *Joslin*, 67 Cal.2d at 140-141; *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 351-354 (1979). In *Joslin*, for example, the Court invoked this test in holding that a downstream riparian user using water for gravel washing purposes lacked a prior right as against an upstream municipal water district diverting water for local domestic purposes, even though the downstream riparian use existed long before the upstream municipal use. Similarly, in *Long Valley Creek Stream System*, the Court held that this test applies to riparian water users even though their rights predated the adoption of the test by constitutional amendment in 1928. Indeed, Article X, Section 5 of the California Constitution expressly provides that an appropriative water use is a "public use" that is "subject to the regulation and control of the state, in the manner to be prescribed by law." Thus, the California constitutional system, as interpreted by the California Supreme Court in past cases, provides the measure of water rights in California, and allows reconsideration of such rights on the basis of changing public needs. The petitioner is thus wrong in arguing that California's water rights laws establish "vested, permanent property rights immune from reduction or termination . . . ." Pet. for Cert. 14. The lower decision, in holding that public trust values must be measured against other values in determining the "rea-

sonable and beneficial use" of water, thus unequivocally rests on a "fair or substantial basis."[4]

Clearly the state has a legitimate interest in allocating, and if necessary reallocating, its sparse water resources among important public needs, particularly where the needs served by past allocations are no longer consistent with the public interest. In the West, where water is in short supply, it is economically prohibitive for the state to pay compensation to water rights holders whose rights have become anachronistic in light of modern public needs. Thus, unless the state has the right to make reallocations without the payment of compensation, water resource allocation in the modern West would primarily depend on

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[4]This conclusion is also supported by this Court's decision in *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651 (1927), which is one of the cases on which the petitioner relies. The case dealt with the power of a state to condition a license for dam construction or repair upon the right to take over the improvements under specified conditions. This Court, applying Wisconsin law, held that riparian water rights are subordinate to state control of navigable waters, and that the Fourteenth Amendment interposes no obstacle to such state control. The Court stated:

> "It is for the state in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent." 274 U.S. at 657.

The long-standing California rule is clearly consistent with the Wisconsin rule enunciated in *Fox River*, since independent judicial review of diversions affecting navigable waters has been available in California since its earliest days. See, *e.g.*, *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884) (hydraulic mining impairing navigation and causing flood and pollution nuisance downstream); *People v. Russ*, 132 Cal. 102 (1901) (dams on sloughs adjoining navigable river).

historical patterns of use rather than modern public needs. The Due Process Clause does not, we believe, place a straitjacket around the state in its effort to put its water resources to the best possible public use. Therefore, the holders of water rights cannot reasonably except that the state will not reallocate its water supplies as public needs change from one generation to the next.[5]

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[5]A different and more difficult question might be presented if the lower decision had held that the public trust necessarily exists independently of, and establishes criteria different than, any "reasonable and beneficial use" test established under the California Constitution, a result which would imply that the people lack the power to modify the public trust by state constitutional amendment. Under such circumstances, a common law doctrine would be deemed to override an explicit state constitutional provision relating to water regulation and use. We are not aware that any state court has ever applied common law under these circumstances. Such an application of the common law might arguably interfere with the right of the people to constitutionally regulate and allocate their water resources, and might arguably interfere with the reasonable expectations of water rights holders that their rights will be governed by the state constitutional system. Since the lower decision does not reach this result, it is unnecessary for this Court to determine whether such a result would lack a "fair or substantial basis."

CONCLUSION

For the reasons expressed herein, it is respectfully submitted that this Court should deny the petition for writ of certiorari.

Dated: September 20, 1983.

Respectfully submitted,

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No. 83-300
IN THE

Supreme Court of the United States

October Term, 1983

CITY OF LOS ANGELES
DEPARTMENT OF WATER AND POWER,

Petitioner,

vs.

NATIONAL AUDUBON SOCIETY, a corporation; FRIENDS OF THE EARTH, a corporation; THE MONO LAKE COMMITTEE, a corporation; and THE LOS ANGELES AUDUBON SOCIETY, a corporation,

Respondents.

Brief in Support of Petition for Writ of Certiorari to the Supreme Court of the State of California

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Questions Presented

The questions presented are accurately and succinctly stated in the Petition for Writ of Certiorari and are hereby adopted by Respondent for purposes of this Brief.

Parties to the Action

Respondent adopts, for purposes of this Brief, the Parties to the Action as set forth in the Petition for Writ of Certiorari.

In addition, the following are subsidiaries and affiliates of Respondent Southern California Edison Company:

Associated Southern Investment Company
Bear Creek Uranium Company
Belridge Field Cogeneration Company
Calabasas Communications Company
Calabasas Park Company
Calabasas Park Company, Inc.*
California Electric Power Company*
Conservation Financing Corporation
Electric Systems Company
Energy Services, Inc.
Kern River Cogeneration Company
Mono Green Mountain Company
Mono Power Company
Mono Power Company (Bolivia)*
Mono Power Company (Italy)*
Mono Power Company (Malaysia)*
Mono Power Company (Nicaragua)*
Mono Power Company (Papua, New Guinea)*
Mono Power Company (Peru)*
Palo Verde Uranium Venture*
Rocky Mountain Energy Company — Mono Power Company — Halliburton Company Uranium Partnership
SCE Capital Company
Southern California Edison Finance Company N.V.
Southern Sierra Energy Company
Southern Surplus Realty Company

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*Inactive

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Respondents.

Brief in Support of Petition for Writ of Certiorari to the Supreme Court of the State of California

Opinions Below

Respondent adopts, for purposes of this Brief, the citations to the Opinions Below contained in the Petition for Writ of Certiorari.

Jurisdiction

Respondent adopts, for purposes of this Brief, the Statement of Jurisdiction contained in the Petition for Writ of Certiorari.

Statutory Provisions Involved

Respondent adopts, for purposes of this Brief, the Statutory Provisions set forth in the Petition for Writ of Certiorari.

Statement of the Case

Respondent adopts, for purposes of this Brief, the Statement of the Case as set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Respondent Southern California Edison Company ("Edison") is the owner of water rights in the Mono Basin including appropriative rights held under permits and licenses granted by the State of California. As the holder of these substantial water rights, Edison has vested proprietary interests at stake in the resolution of this litigation.

In reliance on the permits and licenses issued by the State of California, Edison has expended an enormous investment in hydroelectric power generation and transmission facilities. In the Mono Lake Basin, Edison and its predecessor companies have diverted water for power generation by direct diversions of stream flows and by storage since 1910. The value of these diversions for power generation purposes is great. The decision of the California Supreme Court, however, raises questions about the continuing validity of these water diversions. Moreover, since the decision affects all navigable waters in California, as well as waters tributary thereto, it potentially places at risk all existing water rights and may serve to impede currently planned and badly needed hydroelectric energy development.

Falling water is one of California's most economic and dependable sources of energy and is Edison's oldest generating resource. Edison currently owns 915,000 kilowatts of hydroelectric resources and plans to add more than 220,000 kilowatts during the next ten years as part of its program to accelerate the development of renewable alternative energy sources. In 1982, the electric energy produced by Edison's hydroelectric projects saved its customers over $350,000,000 in fuel costs. The operation of Edison's existing and future hydroelectric facilities is clearly dependent upon its ability to continue to appropriate water pursuant to permits and licenses issued by the State of California. The

decision of the California Supreme Court, however, disrupts the stability of the California appropriative water rights system and clouds the legal interests of those who depend on their vested appropriative rights for energy, agricultural, or municipal purposes.

The legal issues in this case are of vast importance to all appropriative water users in California. Further, if the decision of the California Supreme Court is allowed to stand, the millions of Californians who rely on the validity and permanence of Edison's water rights to generate electricity may be adversely impacted. For these reasons, Edison requests that the Court grant the City of Los Angeles' Petition for Writ of Certiorari.

Dated: September 21, 1983.

Respectfully submitted,

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No. 83-300

In the Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER, PETITIONER

v.

NATIONAL AUDUBON SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Respondent National Audubon Society commenced this litigation in California Superior Court seeking to limit or enjoin diversions of water from the Mono Lake basin being made by petitioner under the color of state water rights. After removal to the United States District Court for the Eastern District of California, the district court decided that it should abstain from further proceedings pending resolution in the state court of novel questions of state law presented. Pursuant to the district court's direction, respondent Audubon filed an action for a declaratory judgment in the superior court seeking a ruling on those issues. Petitioner now seeks review of the ensuing decision of the California Supreme Court holding that the state Water Board or a court of competent jurisdiction may reconsider previously recognized water rights to determine whether they should be modified in light of environmental values embodied in the "public trust doctrine" recognized by that court. The questions presented in this Court are:

1. Whether the California Supreme Court's decision rests upon the misapprehension that *Illinois Central R. R. v. Illinois*, 146 U.S. 387 (1892), creates a rule of federal law binding upon state courts; and

2. Whether the decision of the California Supreme Court effects an uncompensated taking in violation of the Fifth and Fourteenth Amendments.

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v.

NATIONAL AUDUBON SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the California Supreme Court (Pet. App. A1-A56) is reported at 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346.[1] The opinion and order of the superior court (Pet. App. A77-A82) are unreported. The abstention order of the United States District Court (Pet. App. A64-A76) and an amendatory order (Pet. App. A59-A63) are unreported.

JURISDICTION

The judgment of the California Supreme Court was entered on February 17, 1983. A petition for rehearing was denied on April 14, 1983. On June 27, 1983, Justice Rehnquist extended the time for filing the petition for writ of certiorari to and including August 22, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

[1]Modifications to the court's original opinion are reproduced at Pet. App. A57-A58.

STATEMENT

1. In May 1979, respondent National Audubon Society and several affiliated organizations and individuals (hereafter collectively "Audubon") filed an action against petitioner in the Superior Court for Mono County, California, seeking to limit the latter's diversions of water from the Mono Lake basin. The complaint alleged, inter alia, that the "public trust doctrine" recognized by California courts protects instream water uses (*e.g.*, fishing, wildlife habitat preservation, and navigation needs) from impairment by more conventional out-of-stream consumptive uses. Following a change of venue from Mono County to Alpine County, petitioner filed a cross-complaint against the United States, the State of California, and all other water users in the basin, seeking a general adjudication of water rights.[2] Upon motion of the United States, the action was removed to federal district court in February 1980.[3] Petitioner twice moved to remand the case to state court; each time that motion was denied by the district court. The

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[2]Audubon's initial complaint rested entirely on state law grounds. In addition to the public trust doctrine, Audubon alleged violations of various provisions of the California Constitution, and stated claims for public and private nuisance, and to quiet title. Petitioner's cross-complaint also rested on state grounds but, in addition, invoked the provisions of the McCarran Amendment, 43 U.S.C. 666, allowing joinder of all necessary parties, including the United States, in comprehensive water adjudications. The briefs filed by the State of California and the United States upon joinder pursuant to petitioner's cross-complaint also appear to have rested entirely on state law grounds. Audubon subsequently amended its complaint to add a federal common law nuisance claim. The district court is currently considering motions for partial summary judgment that could dispose of the federal common law nuisance claim and for remand of the remaining claims to the superior court.

[3]The petition for removal was based upon the presence of claims affecting federal land titles, and petitioner's claim that the United States had "waived" its "navigation trust" rights affecting Mono Lake.

district court concluded, however, that because the case "raise[d] novel and difficult issues of state law which bear on substantial public policy problems" (Pet. App. A72; see also Pet. App. A70-A71), it should abstain from determining "the interrelationship of the public trust doctrine and the state water rights system" (Pet. App. A75).

Accordingly, the district court judge stayed the federal court action and directed Audubon to seek resolution of the following specific questions of state law by filing an action for declaratory relief in state court (Pet. App. A61):

> 1. What is the interrelationship of the public trust doctrine and the California water rights system, in the context of the right of the Los Angeles Department of Water and Power ("Department") to divert water from Mono Lake pursuant to permits and licenses issued under the California water rights system? In other words, is the public trust doctrine in this context subsumed in the California water rights system, or does it function independently of that system? Stated differently, can the plaintiff challenge the Department's permits and licenses by arguing that those permits and licenses are limited by the public trust doctrine, or must the plaintiff challenge the permits and licenses by arguing that the water diversions and uses authorized thereunder are not "reasonable or beneficial" as required under the California water rights system?
>
> 2. Do the exhaustion principles applied in the water rights context apply to plaintiff's action pending in the United States District Court for the Eastern District of California?

The district court explained that the federal claim raised by Audubon (see page 2 note 2, *supra*) would be addressed "if necessary, following the state court resolution of the public trust issue" (Pet. App. A62). Petitioner's action for a

general adjudication of water rights was likewise stayed. Finally, the district court indicated that "[o]nce a determination is made by the state court regarding the appropriate application of the public trust doctrine," it would proceed to address Audubon's claim that petitioner's diversions should be limited (Pet. App. A62).

2. Pursuant to the district court's order, Audubon filed the present action against petitioner in the Superior Court for Alpine County, seeking a declaration resolving the questions posed by the district court. The State and the United States each intervened in that proceeding. The superior court concluded that the "Public Trust Doctrine does not function independently" of the system of recognized water rights in California, and that Audubon was required to seek any modification of petitioner's existing rights, whether based on the public trust doctrine or more conventional rules of California water law, by exhausting administrative remedies with the state's Water Board (Pet. App. A77-A78).

The California Supreme Court granted review. In that court, Audubon argued that the public trust doctrine operates independently of the conventional water rights regime of the state and accordingly grounds a justiciable cause of action for modification of previously recognized water rights. The state argued that the public trust doctrine was subsumed within California water rights law, and that while the state Water Board has authority under that doctrine to revisit prior water allocation decisions to ensure that they remain in conformity with the public trust, Audubon had failed to exhaust its administrative remedies. The United States argued that the state's body of water rights law was a manifestation of the public trust, but that the trust was spent when the state's appropriative water rights regime was created, and that existing water rights accordingly were not

subject to modification on the basis of public trust considerations.[4] Finally, petitioner argued that the public trust doctrine simply had no application to its water rights.

The California Supreme Court did not accept any of the parties' submissions. A unanimous court recognized the applicability of the public trust doctrine to California water rights insofar as the exercise of those rights affects navigable waterways such as Mono Lake. The court held that the doctrine was neither entirely subsumed within the appropriative water rights system nor entirely independent thereof (Pet. App. A38-A39, A50). The court declared (Pet. App. A50):

> The public trust doctrine and the appropriative water rights system are part of an integrated system of water law. The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty upon the state to take such uses into account in allocating water resources.

The court did not decree that public trust considerations necessarily were to take precedence over existing appropriative water uses. Rather, recognizing that "[t]he population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values," and that "the economy and population centers of this state have developed in reliance upon appropriated water" (Pet. App. A40; footnote omitted), the court affirmed that the "substantial concerns voiced by Los Angeles — the

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[4]The United States also argued, in passing, that modification of vested water rights under a public trust theory could in a particular case effect a taking, just as such a modification based upon exercise of police power could have that effect.

city's need for water, its reliance upon [the Water Board's approval of its diversions and] the cost both in terms of money and environmental impact of obtaining" alternative water supplies "must enter into any allocation decision" (Pet. App. A43). The court emphasized that it was permissible for the state to "approve appropriations despite forseeable harm to public trust uses," provided the effect of the appropriations upon public trust values had been considered (Pet. App. A41). The court further explained that its decision did "not dictate any particular allocation of water" (Pet. App. A51), stating, "[w]e hold only" that the interests of the petitioner "do not preclude" reconsideration of prior water allocation decisions of the state's Water Board in light of contemporary needs (Pet. App. A43). Summarizing its decision by answering the question posed by the district court, the California court stated: "We reply that [Audubon] can rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono Basin" (Pet. App. A51). Turning to the second question referred by the federal court, the California court held that the courts and the Water Board have concurrent jurisdiction of petitions seeking such reconsideration (Pet. App. A44-A45). Exhaustion of administrative remedies was not required, but the California Supreme Court emphasized the authority of the courts under California law to refer the issues to the Water Board for decision (Pet. App. A45-A50).

ARGUMENT

The decision below represents a significant and unwelcome development in the contours of California water law. The United States fully shares petitioner's concern that the California court's decision creates the potential for disruption of what were justifiably thought to be settled water rights. And the rights of the United States, as the largest holder of water rights in California, may well be affected by

the California Supreme Court decision. Moreover, impairment of existing water rights would have particularly serious consequences in the arid West; even the creation of a cloud upon such rights is onerous in circumstances where, as this Court has recognized, the need for stable, secure and known water rights is critical to the proper use of this scarce resource. See, *e.g.*, *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 13-14. In short, the United States is sympathetic with petitioner's criticism of the decision below, and adheres to the view that, as a matter of state law, the public trust doctrine should not be applied so as to disrupt settled expectations respecting property rights in water. Nevertheless, we are doubtful that the case, in its present posture, presents any federal question that is ripe for review by this Court.

1.a. The conclusion that the California Supreme Court's decision rests entirely on state law is difficult to resist. There is nothing in the opinion below that suggests that the issues decided were regarded as questions of federal law. To the contrary, the court characterized its task of "integrat[ing] * * * the public trust doctrine and the board-administered appropriative rights system" as the delineation of "[t]he water law of California" (Pet. App. A5). Moreover, the opinion of the court below reflects its understanding that the state court proceedings were initiated only "to allow resolution by California courts of two important issues of California law" (Pet. App. A14-A15). The abstention procedure used by the district court was designed to have the effect of certification of questions of state law (see Pet. App. A60-A62). The California court recognized it as such, stating that the basis for abstention was the presentation to the federal court of " 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar' " (Pet. App. A15 n.12, quoting *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 814 (1976)).

b. Petitioner seeks (Pet. 18-23) to locate a federal question in this case arising from the California Supreme Court's discussion (Pet. App. A24) of *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387 (1892). Petitioner argues that the California court mistakenly viewed *Illinois Central* as creating a rule of "paramount federal law" (Pet. 9) binding upon state courts. But, as petitioner acknowledges (*ibid.*), it has long been settled that the public trust doctrine articulated in *Illinois Central* constituted a rule of state, rather than federal law. *Appleby* v. *City of New York*, 271 U.S. 364, 395 (1926).

Nor is there any basis in the record or the California court's opinion for inferring that the court misapprehended the basis for *Illinois Central* or felt obliged to conform state law to supervening authority of federal law. Compare *Michigan* v. *Long*, No. 82-256 (July 6, 1983), slip op. 7. First, as we have noted, the California court repeatedly characterized the issue as one of state law. These references satisfy the "plain statement" rule of *Michigan* v. *Long*, slip op. 7. Second, courts, even more than Congress, may be presumed to know the law, see *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); the elementary misconception that petitioner hypothesizes should not lightly be attributed to the California court. This is especially so because the notion that federal law would govern state water rights is inherently improbable given this Court's repeated emphasis on the primacy of state law in the area of water rights in all but a few well-defined situations. See *Sporhase* v. *Nebraska ex rel. Douglas*, No. 81-613 (July 2, 1982), slip op. 16-18; *California* v. *United States*, 438 U.S. 645, 653-670 (1978). Third, the California court's opinion in this case reflects its appreciation that *Illinois Central* does not state a rule of federal law, for the court below described itself as "indors-[ing] the *Illinois Central* principles" in an earlier case (Pet. App. A26); this is scarcely an apt choice of language to

characterize the operation, under the Supremacy Clause, of this Court's decisions on questions of federal law. Fourth, citing *Appleby* v. *City of New York, supra,* the California Supreme Court has expressly recognized that although "the general principle declared [in *Illinois Central*] has been recognized throughout the country," that decision is necessarily a statement of Illinois law." *State* v. *Superior Court of Lake County (Lyon),* 29 Cal. 3d 210, 228 n.16, 625 P.2d 239, 250 n.16 172 Cal. Rptr. 696, 707 n.16, cert. denied, 454 U.S. 865 (1981).[5]

Finally, we note that, in addition to *Illinois Central,* the decision below rests upon a host of state court decisions, including decisions rendered prior to *Illinois Central.* See, *e.g., People* v. *Gold Run Ditch & Mining Co.,* 66 Cal. 138, 4 P. 1152 (1884). In short, it appears that *Illinois Central* represented nothing more than a seminal articulation of the public trust analysis that the California courts have adopted. Its citation cannot convert the decision below into one based on federal law.[6]

2.a. Petitioner contends alternatively (Pet. 23-28) that the mere recognition of the applicability of the public trust doctrine to its previously recognized appropriative water rights effects a taking that is presently ripe for review because it effectuates a "sudden," "startling" change in the terms of state law water rights, rendering insecure

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[5] *Lyon* in turn is cited in the opinion below (see Pet. App. A21).

[6] In addition to *Illinois Central,* the court below referenced the Institutes of Justinian (Pet. App. A18), Spanish and Mexican law (Pet. App. A18 n.15), and the English common law (Pet. App. A20). Plainly these references reflect their analytical or historical relevance, and do not betoken any view that Roman or Spanish law bound the California court. There is no more reason to think that the citation of *Illinois Central* reflects an analogous misconception. At bottom, petitioner's contention (Pet. 9 n.3, 14-17) is that the decision below so radically misinterprets California law that it should be deemed ultra vires, and thus not based on state law.

previously indefeasible titles. We are not so persuaded. We do adhere to the view noted below (see page 5 note 4, *supra*) that the application of public trust principles to limit previously recognized water rights may in some circumstances effect a taking. And we further agree that a drastic systematic redefinition of property rights may in some circumstances be ripe for judicial review under the Fifth and Fourteenth Amendments before its application to particular property rights has been fully determined. But in our judgment no taking claim is ripe for review at this time in this case.[7]

As our account of the California Supreme Court's decision should make clear (see pages 5-6, *supra*), it is far from certain that petitioner will in fact suffer any diminution of its rights to divert water from the Mono Basin. Rather, the competent authority — which may yet turn out to be the district court, the superior court, or the state Water Board —must engage in the analysis mandated by the court below. As that court recognized, it may yet be determined that "the needs of Los Angeles outweigh the needs of the Mono Basin, [and] that the benefit gained is worth the price" (Pet. App. A42). Moreover, separate and apart from this state law analysis, we believe that further proceedings must address the question whether a particular diminution

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[7]We note that there is some question whether petitioner may complain in this Court of a taking effected by state action. As petitioner acknowledges (Pet. 26 n.9), a municipality ordinarily may not raise such a challenge. *Coleman* v. *Miller*, 307 U.S. 433, 441 (1939); *Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40 (1933); *City of Trenton* v. *New Jersey*, 262 U.S. 182, 188 (1923). It is difficult to see why the fact that the alleged taking stems directly from judicial action that is based on the state's assertion, reflected in its Constitution and statutes, of title to waters within its boundaries should alter that rule. Any error that petitioner discerns in the state court's articulation of state water law does not make the pronouncement of the state court any less the law of the state, subject, of course, to legislative correction.

in water rights actually effects a taking of vested rights — a question impossible to answer in the abstract, or without consideration of any compensating adjustments in petitioner's water rights that might be decreed. Given the overriding uncertainty that presently exists as to the actual impact of the decision below upon the rights held by petitioner, it would be difficult, indeed meaningfully, to assess the taking claim. See *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 636 (1981) (Rehnquist, J., concurring).[8]

The Court has typically awaited actual application of a new legal regime that affects existing property rights and the development of a concrete factual record for adjudication before undertaking to determine analogous taking claims. For instance, in upholding the then novel institution of municipal zoning in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395-397 (1926), the Court declined to anticipate the possible application of the ordinance to particular cases, noting the absence of the necessary factual record, the inappropriateness of ascertaining the impact of the ordinance by "mere speculation," and the "embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue" (*id.* at 397). Yet the claim in *Euclid*, as here, was that the "mere existence and threatened enforcement of the ordinance [or doctrine] * * * materially and adversely affect[s]" the value of the rights subject thereto (*id.* at 395). See also *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 & n.3, 595-596 (1962).

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[8]Review at this juncture might also tend to frustrate the State's prerogative to choose — through its courts — whether to tailor its public trust doctrine to avoid taking of particular water rights or to pay compensation in the event of a taking. See *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. at 658-660 (Brennan, J., dissenting); *id.* at 633-634 (Rehnquist, J., concurring, "agreeing with much of what is said in the dissenting opinion").

In other contexts, as well, the Court has eschewed determination of a taking issue where further proceedings are needed to determine whether there is actually an impairment of rights, see, *e.g., Dames & Moore* v. *Regan*, 453 U.S. 654, 688-689 (1981).[9] Although particularly suited to the taking question, which cannot be decided without regard to all pertinent circumstances (see *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978)), these principles have also guided the Court in other forms of constitutional adjudication. See, *e.g., Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 10. Because this Court cannot know whether state law will ever actually require diminution in existing diversions, "judicial consideration * * * should await further developments" (*ibid.*; footnote omitted). See also *Minnick* v. *California Department of Corrections*, 452 U.S. 105, 120-127 (1981).

b. Petitioner's reliance (Pet. 24-27) on Justice Stewart's concurring opinion in *Hughes* v. *Washington*, 389 U.S. 290, 294-298 (1967), is misplaced. The state court ruling in *Hughes* that Justice Stewart would have disapproved even if the matter were within the ambit of state law, had the immediate effect of depriving the petitioner of title to the accreted lands in question. No further proceedings were

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[9]Plainly the substitution, upheld in *Dames & Moore*, of the right to proceed in the Iran-United States Claims Tribunal for the private claims pending in United States courts that were settled by the President deprived those claimants of an element of certainty and security they previously possessed. Yet, although the Court declined to be "overly sanguine about the chances of United States claimants before the Claims Tribunal," the Court declined to decide whether the suspension of claims itself effected a taking. 453 U.S. at 687, 688 & n.14.

needed in *Hughes* to ascertain whether or to what extent the state court ruling would affect the petitioner's interest.[10]

3. Several prudential considerations also counsel against further review in this case. It does not appear that petitioner or any other party argued below that the mere possibility of reconsideration of previously recognized appropriative water rights in light of public trust considerations would effect a taking. And nothing in the California court's opinion addresses such a claim.[11] Accordingly, consideration of petitioner's across-the-board taking theory is inappropriate in this case. See *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 2-9.

Although we share petitioner's disppointment concerning the decision below, we must also recognize that the decision arises in an area that has traditionally been primarily the province of state law. Just as Congress has traditionally deferred to state water law in a wide variety of situations, *California* v. *United States*, 438 U.S. at 653, under

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[10]Other cases cited by petitioner (Pet. 28) are inapposite. Most rest upon the Contract Clause (Art. I, § 10, Cl. 1) of the Constitution, which proscribes the making of any "Law impairing the Obligation of Contracts;" claims under the Contract Clause therefore may be ripe for adjudication at an earlier juncture than taking claims. No Contract Clause claim is raised in this case. *Sotomura* v. *County of Hawaii*, 460 F. Supp. 473 (D. Hawaii 1978), addresses legislative action having an immediate effect on property interests and therefore is distinguishable.

[11]The court's occasional references to the "vested" or nonvested character of California water rights to which petitioner points (Pet. 10 n.5) does not reflect any consideration of the taking theory now advanced by petitioner. It may well be that the California court adheres to a view of the public trust that precludes a finding of a taking in a particular case, even if previously recognized water rights are substantially impaired (see Pet. App. A29 n.22). But no such question is ripe for review on the record of this case.

principles of comity and federalism it appears appropriate — absent a clearly delineated violation of federal rights —for the federal judiciary to defer to the courts of California on questions of water law that affect only California water users. Accordingly, notwithstanding our own considerable misgivings about the decision below, we conclude that any improper impairment of settled expectations respecting water rights that might result from further proceedings under the standards announced in this case may best be redressed when and if it occurs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

DOJ-1983-10

No. 83-300

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES
DEPARTMENT OF WATER AND POWER,
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vs.

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REPLY BRIEF OF PETITIONER CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER IN SUPPORT OF PETITION

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REPLY BRIEF OF PETITIONER CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER IN SUPPORT OF PETITION

INTRODUCTION

None of the briefs responding to our petition contest that the decision below has enormous ramifications in unsettling water rights on which the people and economy of California and the West have long relied. Instead, the arguments in the only briefs opposing the petition, those of the State and the United States,[1] are: (1) The decision rests on a "fair and substantial basis" of state law; (2) the questions raised are not ripe for review; and (3) in any event, petitioner lacks standing to raise them. Each of these arguments is wrong.

THE COURT BELOW COULD NOT HAVE RELIED ON STATE COMMON LAW TO OVERRIDE STATE STATUTORY LAW

The State and the United States seek to avoid this Court's review by arguing that the California court's new "public trust" pronouncement is based on state rather than federal law. State Br. 9-10, United States Br. 7-9. It is impossible, however, to read the entire decision and logically reach that conclusion.

The United States argues that, because courts are presumed to know the law, it must be assumed the court below recognized that *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), is not a ruling of federal law. United States Br. 8. But the only conclusion which logically flows from the California court's decision is either that it did not know the law or that it simply ignored it.

As pointed out in our petition, California's common law *cannot* override its statutory law. Pet. 9. The court below is presumed to know that basic legal principle also. Therefore, only by relying on *Illinois Central* as constituting *controlling federal authority* could the court below have

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[1] Audubon and its allies, the prevailing parties below, did not file a responsive brief. All the other briefs supported the petition.

rationally overturned the vested, permanent nature of appropriative rights in California, which is established by explicit language in its appropriation statute.

As a result, the holding of this Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) is applicable:

> Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare . . .

Footnote 5 of the State's brief (p. 16) is more pertinent than anything else in either opposition brief. It evidences the State's concern that the decision below could, indeed, be interpreted as having created some new type of "super law" that would interfere with the right of the people of the state to constitutionally or statutorily regulate their affairs. We contend that is the *only* rational interpretation. Like the State, we are unaware of any other court decision which has elevated a common law concept to such a position of preeminence that it supersedes state constitutional and statutory water resource allocation programs. When a state court decision makes such a drastic assertion of judicial authority, when it fails to articulate even the most rudimentary state law support for the assertion, and when it cites a United States Supreme Court case as "the primary authority," App. 24, the logical conclusion is that an overriding federal precedent was believed to control.

THE CALIFORNIA COURT'S DECISION VIOLATED PETITIONER'S DUE PROCESS RIGHTS

In our petition, we argued that the state court's precipitous divestiture of the permanence and certainty of petitioner's water rights was such a sudden, unforeseeable shift in state law, and so without substantial basis, that it amounted to a deprivation of property without due process. Pet. 23-27. Only the State (which in the court below had argued that public trust limitations could *not* be superimposed on vested water rights) has now attempted to defend the decision below as not constituting an unconstitutional taking of water rights, on the ground that it rests on a "fair and substantial basis." State Br. 15.[2] However, the State's present defense of the decision hinges on a gross mischaracterization of its holding.[3]

The State describes the decision as having held "in effect . . . that the public trust doctrine is incorporated in the [state] constitutional test [of reasonable and beneficial use]." State Br. 6. By thus attempting to tie the decision to the well established doctrine of reasonable and

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[2]By contrast, the United States' brief, the only other one opposing the petition, acknowledges that the state court's decision "creates the potential for disruption of what were justifiably thought to be settled water rights" in the West, where "even the creation of a cloud upon such rights is onerous." United States Br. 6-7. The United States' opposition is based, not on any defense of the state court's decision, but on its belief, refuted *infra*, that review is premature at this time.

[3]The State's frank admission of the motivation for its change of position underscores the constitutional dimensions of the issues. Because "it is economically prohibitive for the State to pay compensation to water right holders" who would be affected by the State's reallocation of water supplies, the State seeks a declaration that such reallocation would not violate due process guarantees. State Br. 15-16. But constitutional protection of property rights does not stand or fall depending on the financial impact on the State of its desired property acquisitions.

beneficial water use, the State apparently hopes to avoid the due process issue raised in the petition.

It is obvious that the court below did not base its decision on the doctrine of reasonable and beneficial use. The case as presented to the state court was carefully structured to distinguish *between* that doctrine and the public trust doctrine on which the case was decided.

In its abstention order, the federal district court contrasted the two doctrines and directed Audubon to seek an answer by the state courts as to whether Audubon could rely on the public trust doctrine to the exclusion of the reasonable and beneficial use doctrine:

> [C]an the plaintiffs challenge . . . [Los Angeles'] permits and licenses by arguing that those permits are limited by the public trust doctrine, *or* must the plaintiffs challenge the permits and licenses by arguing that the water diversions and uses authorized thereunder are not "reasonable or beneficial" as required by the California water rights system?

App. at 61; emphasis added.

Audubon understood the distinction. In its state court complaint it sought "an order from the court that it is entitled to rely upon causes of action based on the public trust doctrine *as distinct from* the doctrines of 'reasonable and beneficial use.'" *National Audubon Society, et al. v. Department of Water and Power of the City of Los Angeles, et al.;* Alpine County Civil No. 639; Complaint for Declaratory Relief filed March 23, 1981, at 6; emphasis added. The difference between the doctrines was also reflected in the decisions of the Alpine County Superior Court (App. 77) and the court below.

The latter specifically pointed out that its decision did *not* rest on the concept of reasonableness. It noted, and

dismissed as irrelevant, a dispute between the parties over the definition of unreasonable use:

> [D]oes it [unreasonable use] refer to only inordinate and wasteful use of water . . . or to any use less than the optimum allocation of water? . . . *In view of our reliance on the public trust doctrine* as a basis for reconsideration of DWP's usufructuary rights, we need not resolve that controversy.

App. at 42, n. 28; emphasis added; *see also* App. 16, 44, and 51.

Only in its final footnote does the State address the decision below as actually written:

> A different and more difficult question might be presented if the lower decision had held that the public trust necessarily exists independently of, and establishes criteria different than, any "reasonable and beneficial use" test established under the California Constitution, a result which would imply that the people lack the power to modify the public trust by state constitutional amendment.

State Br. 16, n. 5.

In short, the State, finding no "fair or substantial basis" in California law which could support the decision below, as written, invented a different holding which would enable it to retain the power accorded it by the decision and "forestall . . . review of the constitutional question." *Fox River Paper Co. v. Railroad Comm'n.*, 274 U.S. 651, 657 (1927).

THE ISSUES PRESENTED IN THE PETITION SHOULD BE DECIDED WITHOUT FURTHER DELAY

The United States concedes that "a drastic systematic redefinition of property rights may in some circumstances be ripe for judicial review under the Fifth and Fourteenth

Amendments before its application to particular property rights has been fully determined." United States Br. 10. Nevertheless, it then takes the position that in this particular instance, "no taking claim is ripe for review at this time." *Ibid.*

The United States never explains why it considers additional state court proceedings essential to this Court's determination of whether the decision below constitutes a sudden and unpredictable change in state law which violates petitioner's due process rights. It only hypothesizes that in applying the new doctrine, state courts might make "compensating adjustments in petitioner's water rights" or "tailor [the] public trust doctrine to avoid taking of particular water rights or to pay compensation in the event of a taking." *Id.* at 11, n. 8. That the United States harbors such hopes reveals its misunderstanding of the decision below.

The essence of the decision was that petitioner *has no vested rights* to divert water and that the determination that petitioner's water rights are subject to the trust is not considered a taking requiring compensation.[4]

The state court's finding that petitioner's water rights are subject to revocation for public trust purposes *precludes by definition* any later finding of a taking requiring the payment of compensation. Accordingly, it cannot rationally be anticipated that the state court may "tailor its

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[4]The court below clearly held that the water right grantee "holds subject to the trust and while he may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or State action to carry out its purposes." App. 30; *see also* App. 4, 29, 43, 48. These citations demonstrate, contrary to the United States' assertion, United States Brief at 13, n. 11, that the court below did consider the taking issue. It ruled that under its explication of the public trust doctrine no taking could occur.

public trust doctrine to avoid [a] taking" which it has already held, by definition, cannot occur.

The State and the United States rely on cases involving governmental *regulation* of property to support their assertion of this case's prematurity. These citations are inapposite. First, this case does not involve the government's right to regulate petitioner's use of its property. Rather, it involves an assertion of governmental power to expropriate the property itself for public use and public benefit. Second, the question presented to this Court is not whether an individual exercise of a conceded governmental power goes too far and crosses the line between permissible regulation and confiscatory taking. Rather, the question is whether the State's arrogation to itself of such power in the first instance violates petitioner's vested property rights. This latter issue is unquestionably ripe for determination.[5]

In this regard, the case is similar to *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which the Village's adoption of a zoning ordinance was challenged as an unconstitutional invasion of petitioner's property rights. This Court rejected the contention that the challenge was premature, noting that:

> The motion [for dismissal] was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability . . . and the attack is directed, not against any

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[5]The cases cited by the United States (United States Br. 11-12) involve the legality of specific applications of governmental authority, an issue which concededly could not be decided without reference to the individual factual circumstances of each case. Where, as here, however, the issue was the underlying authority of the government to adopt the broad scheme of action, it was considered ripe and was, in fact, decided. See *e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

> specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance in effect constitutes a present invasion of appellee's property rights. . . . Under these circumstances, the equitable jurisdiction is clear.

Id. at 386.

Similarly, here, the lack of specific enforcement of the public trust to reduce petitioner's diversions is immaterial to a consideration of whether the California court's assertion of the State's power to do so unconstitutionally deprived petitioner of vested rights which it previously enjoyed.

Even more analogous is the recent case of *Nevada v. United States*, ... U.S. ....., 103 S.Ct. 2906 (1983). There this Court's consideration of whether petitioner Truckee-Carson Irrigation District's water rights *could* be reduced consistent with principles of federal law was not deemed premature or unripe in advance of proceedings to determine whether those rights actually *would* be reduced. The same reasons supporting ripeness in that case warrant similar expeditious review here.

No additional proceedings are necessary to enable consideration of the questions presented by the petition. Indeed, speedy consideration by this Court may obviate the need for further proceedings and could forestall the disruptive effect of the state court's decision on California water rights which has already begun to be felt. See, e.g., Brief of Amicus Curiae Metropolitan Water District of Southern California, 13-15.

PETITIONER HAS STANDING TO RAISE THE TAKING ISSUE

The United States further questions "whether [the City] may complain in this Court of a taking by state action." United States Br. 10. Its citation of this Court's decision

in *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), to support its concern indicates both a misunderstanding of *Trenton* and a failure to review the relevant California Constitutional provisions and judicial precedents.

Trenton held that a municipality could not complain of a taking of property by state *legislative* act. The ruling, however, was supported by the specific finding that the New Jersey Legislature possessed the right to create or destroy the municipality and the view that the power to take a portion of its property without compensation was clearly an element of that right. *Trenton's* narrow holding cannot be expanded to a judicial body which does not hold similar life and death powers over the municipality.

Controlling California law also limits the State's "taking" authority to legislative actions. In *Mallon v. City of Long Beach*, 44 Cal.2d 199 (1955), the seminal case in this area, the California Supreme Court ruled:

> [T]he State *acting through the Legislature* has the power to alter contractual or property rights acquired by the municipal corporation. . . .

Id. at 209; emphasis added. Therefore, under California law, the City is not barred from asserting a taking claim based on other than legislative action.[6]

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[6]The United States also overlooks additional language in both the *Mallon* and *Trenton* cases. According to *Mallon*, under Article XI, Section 5 of the California Constitution, even the Legislature's power to take a city's property without compensation is limited to property not used to carry out "municipal affairs." 44 Cal.2d at 209. *Trenton* recognized that a state constitutional provision could safeguard a municipality and grant it self-government powers which are even beyond the control of the legislature, 262 U.S. at 187. The California Constitution affords the City of Los Angeles just such protection and shields it from a State taking of property needed for municipal purposes.

CONCLUSION

The decision below raises important federal questions regarding the public trust and due process protection of water rights. To answer these federal questions, and prevent the turmoil which application of the decision is already causing, petitioner urges this Court to issue a writ of certiorari as prayed.

Dated: November 1, 1983

Respectfully submitted,

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No. 83-300

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OCTOBER TERM, 1983

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THE MONO LAKE COMMITTEE, a corporation;
and the LOS ANGELES AUDUBON SOCIETY, a corporation;
Respondents.

BRIEF OF AMICUS CURIAE ASSOCIATION OF CALIFORNIA WATER AGENCIES IN SUPPORT OF CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

I. Does the judicially created public trust doctrine take precedence over state constitutional and statutory provisions adopted by votes of the people of California?

II. Does the sudden and unpredictable change in state law effected by the California Supreme Court, destroying the permanent and vested nature of appropriative water rights, constitute a taking in violation of the Fourteenth Amendment?

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CONSENT

In accordance with Supreme Court Rule No. 42, the ASSOCIATION OF CALIFORNIA WATER AGENCIES (ACWA) has obtained from representatives for petitioners and respondents the necessary written consents to file a brief in support of the City of Los Angeles Department of Water and Power Petition for Writ of Certiorari.

INTEREST OF AMICUS CURIAE

This Amicus Curiae Brief is submitted on behalf of ACWA in support of Petitioner. ACWA is a non-profit California corporation. More than 250 public water agencies are members of ACWA. Member agencies provide approximately 85 percent of the agricultural, domestic, municipal, and industrial water delivered in California. More than 7,000,000 acres of land are served. Much of this water is diverted pursuant to appropriative rights acquired under the California Water Code, which are the same type of water rights as those of the Petitioner.

ACWA and its members are vitally interested in the legal issues before the Court in this case. The public trust theories adopted by the California Supreme Court could cause unprecedented disruption to the delivery of water to agricultural, domestic, municipal, and industrial users throughout the state.

ACWA's members rely on the continuity of the California water rights system and on the certainty which the system provides for existing and future water diversion. The decision that appropriative rights can now be reopened and reconsidered at any time to reevaluate competing public trust values threatens both that certainty and continuity. Water rights which have been fully vested under California law have been taken. It is imperative that this Court grant certiorari now and restore appropriative water rights to their proper status as vested property rights.

OPINIONS BELOW

The decision of the California Supreme Court is reported at 33 Cal. 3d 419, and modified at 33 Cal. 3d 726a. The decision and modification are reproduced in the Appendix of Petitioner at pages 1-58. The prior decision and judgment of the lower California court, the Alpine County Superior Court, were not published; they are reproduced in the Appendix of Petitioner at pages 77-82.

STATEMENT OF THE CASE

ACWA adopts the STATEMENT OF THE CASE set forth by Petitioner but wishes to expand on certain portions of the Statement as discussed below.

Importance of this case

State and federal governments have increasingly tried to make water rights as certain as possible. This court has endorsed this goal, stating in its most recent decision in *Arizona v. California* that certainty "is particularly important with respect to water rights in the Western United States". *Arizona v. California*, ... U.S. ....., 102 S. Ct. 1382, 1392 (1983).

This court also noted that the appropriation doctrine is "the prevailing law in the western states, [and] is itself largely a product of the compelling need for certainty in the holding and use of water rights." *Id.* The California Supreme Court's new application of public trust theory not only breaks away from the prevailing movement to increase certainty of water rights, but applies public trust theory to the most certain type of water rights obtainable in California, licensed appropriative water rights.

Petitioner acquired its appropriative water rights by complying with all applicable state statutes and regula-

tions. The appropriative rights it acquired are evidenced by licenses which state a maximum rate, quantity, and season of diversion, subject to terms and conditions. California water rights law assured Petitioner that if it diverted water in accordance with the limitations, terms, and conditions of its licenses, it had a vested right to continue to divert.

This assurance is critically important to Petitioner and all water right holders in California. In reliance on the continued viability of the prior appropriation system and the water rights system in general, Petitioner has made enormous investments of public funds for water diversion and conveyance facilities.

Petitioner is not alone. Many ACWA members have acquired appropriative licenses or permits and have made huge investments of public and private funds for water projects. Water districts, water agencies, and municipalities of all sizes, as well as the massive state and federal projects, rely on the continued integrity of California's appropriation process to obtain permanent and certain water rights. They have complied with the state statutes and regulations, as Petitioner has, in order to perfect secure and certain water rights to ensure that they can continue to serve their water users.

Petitioner, as well as many ACWA members, could be forced to seek alternative water supplies from other areas. Petitioner and ACWA members have relied on being able to continue to take water from their present sources, and consequently have not pursued projects which would have used different sources of water, sources which are now no longer available or feasible. As appropriators are forced

to seek substitute water, the pressure on remaining sources will increase even beyond what it is today.

California water law does not allow water users to plan for possible loss of rights. It is impossible to obtain an appropriative right to water to be used as a contingency, emergency supply. A fundamental precept of California water rights law is that water that is appropriated must be put to reasonable and beneficial use, or the appropriative right is lost. There is, therefore, no protective action Petitioner or ACWA members can take to ensure undisrupted water service to their users in the face of public trust attack. *Nevada County and Sacramento Canal Co. v. Kidd,* 37 Cal. 282, 315 (1869).

The California water rights system has, until the California Supreme Court's decision, required that competing demands for water be balanced and the public interest be considered only *before* appropriation was permitted. This is logical and practical. It allows reasonable planning of water projects to be done. A water right holder must be able to rely on its right to divert continuing *before* it plants permanent crops, *before* it begins to serve expanding municipal supply systems, *before* it expends billions of dollars of public funds for water conveyance facilities.

Now, every appropriative right in California can also be reevaluated *time after time* to reweigh the competing uses which could be made of the water. The California Court's language is broad:

> "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water

> resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust."

Appendix of Petitioner 41.

ACWA members are concerned that the California Supreme Court's novel "power to reconsider allocation decisions" could wreak havoc with financing arrangements for both existing and prospective water diversion and conveyance projects. Where bonds are outstanding, a decision to reallocate water could upset the operation of the project as well as the security of project bond holders who have also relied on vested water rights remaining intact for the life of the project. The impact of the California Court's ruling on future bond and other financing is not yet clear, but the possible application of public trust theories will have to be taken into consideration in financing future projects.

The California Supreme Court considered only the application of public trust theory to appropriative rights. It did not address the question of whether any other types of water rights recognized in California are vulnerable to public trust attack. Although no one can predict the nature and extent of application of public trust theories to limit diversion by riparians or prescriptive right holders or to limit extraction of groundwater, such application appears to be possible. Any expansion of the application of public trust theories would compound the uncertainty created in this case.

Respondents opposing Petitioner's petition may argue that ACWA's fears are overstated. They are not. Water rights are intrinsically fragile rights. They are certain only to the extent that the system upon which they are based remains intact. The decision of the California Supreme Court has shaken the California water rights system to its foundation.

The public and private entities who are responsible for supplying water to the people of the state are faced with a quandary. Even though the people of the state have by Constitutional Amendment approved the appropriation system and mandated the reasonable and beneficial use of water, they must now anticipate that their water rights can be challenged on the basis of public trust theory. No matter how much money, public or private, has been invested in water diversion and conveyance facilities, no matter how long a diversion may have continued, no matter who may be benefitting from a diversion, no matter what interests and parties may be affected by a consequent search for replacement supplies, water rights may now be taken without just compensation in violation of the Due Process Clause of the Fourteenth Amendment.

The Federal Questions Presented

The decision of the California Supreme Court presents the following substantial federal questions which should be reviewed by this court without delay.

First, the California Court elevated public trust principles enunciated by this court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892) above state constitutional and statutory provisions adopted by state-

wide votes of the citizens of California. By so doing, the California Supreme Court incorrectly applied the public trust doctrine. This doctrine was created as a judicial check to protect citizens from questionable acts of legislative and administrative officials. Applying this doctrine to undermine a water rights system adopted by votes of the people constitutes an inexcusable misinterpretation of *Illinois Central* and results in a gross abuse of the due process rights of the voters of the state in violation of the Fourteenth Amendment to the United States Constitution.

Second, by subjecting all vested appropriative rights to reconsideration and reduction without compensation, the California Supreme Court has effected a taking of property in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The California Court's decision destroyed previously vested, permanent property rights. It did so in a sudden manner, completely unpredictable, and without precedent. This constitutes a clear taking without compensation.

This matter is ripe for review now. Quantification of damage is not necessary to demonstrate that there is a loss. *See, e.g., Nevada v. United States*, ... U.S. ....., 103 S. Ct. 2906, 2910 (1983). The issues will not be altered or more fully developed by waiting until there is an actual reduction in water rights. Waiting will only cause undue delay in reaching an ultimate decision, cause continued uncertainty, cause numerous water right holders to expend money in search of possible alternative water supplies, and result in great expenditures in both time and money as water rights throughout the state are challenged by interest groups such as the Audubon Society. Failure to address

these important issues today will have a devastating impact on the use and development of water in a state where the economy and well being of its citizens are totally dependent on the continued certainty of water rights and the consequent continuous and rational development of its limited water supplies. These circumstances require immediate review. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975).

ARGUMENT

I

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS REGARDING THE APPROPRIATION AND PERMANENT VESTING OF WATER RIGHTS IN CALIFORNIA ADOPTED BY VOTES OF THE PEOPLE CLEARLY TAKE PRECEDENCE OVER CONTRARY NOTIONS EXPRESSED IN THE JUDICIALLY CREATED PUBLIC TRUST DOCTRINE

The California Supreme Court has elevated common law or "natural law" public trust principles above the will of the people of California. The people clearly and directly expressed their will by voting to adopt the Water Commission Act in 1914, and by initiating and adopting a Constitutional Amendment in 1928. Previous decisions of this Court and Acts of Congress have also recognized the paramount nature of state-adopted systems of water allocation and completely support the states and their citizens in the development of such systems.

It is not clear what paramount authority the California Supreme Court could have been relying on in reaching its decision. It could not have been relying on state common law,

since the elevation of state common law above state constitutional law is clearly contrary to the California Court's own judicial precedents. *See, e.g., Apple v. Zemansky*, 166 Cal. 83 (1913); *San Joaquin and Kings River Canal and Irrigation Co. v. Stevinson*, 165 Cal. 540 (1914); *In Re Braun*, 141 Cal. 204 (1903).

The State Supreme Court may have relied on some notion of "natural law" to reach the frightening conclusion in this case. We question whether there is any place in the American system of jurisprudence for such reliance on "natural law". Can the California Supreme Court create an invulnerable doctrine of "natural law" which neither Petitioner nor anyone else can challenge? Can the California Supreme Court create a "self-evident" doctrine which cannot be changed or overturned by anyone, not the people by Constitutional Amendment and statewide vote, not the State Legislature, not this Court? If the State Court is indeed relying on "natural law", this Court must reject such an arrogation of absolute power.

If, on the other hand, the California Supreme Court was relying on federal common law, it incorrectly interpreted what is recognized as the seminal case, *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), and violated the due process rights of the voters of the state.

A. The Public Trust Doctrine Has Been Incorrectly Applied

In *Illinois Central*, the Court was confronted with a situation where the State Legislature had acted without public consent. This case presents a totally opposite situation.

Here, the people have spoken by statewide vote on two occasions. On both occasions, they confirmed their desire that the California water rights system continue the recognition and granting of vested appropriative water rights.

In the 1914 general election, the voters of California approved adoption of the Water Commission Act, ch. 586, 1913 Cal. Stats. 1012 (1913). The main purpose of the Act was to provide an orderly system for appropriation of water, a system which was based on local customs, adopted and encouraged by the State Supreme Court, and confirmed by Congress and the United States Supreme Court.[1]

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[1]When the original thirteen states formed a new Union, they retained control of their navigable waters. *See, e.g. Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845); *Shively v. Bowlby*, 152 U.S. 1 (1894). When new states joined the Union, they were admitted on an "equal footing" with the original thirteen states, and thus also acquired control of their navigable waters. *Pollard's Lessee v. Hagan, supra* at 223-224. Since California was admitted to the Union on an "equal footing" with other states, 9 Stat. 452 (1850), it necessarily acquired control of its navigable waters.

In exercising this control the state, from the early gold mining days, has encouraged and authorized the appropriation of water from rivers and streams. *Irwin v. Phillips*, 5 Cal. 140, 147 (1855). These appropriative water rights recognized and approved by the state were confirmed by the Congressional Acts of July 26, 1866, 14 Stat. 253, and July 9, 1870, 16 Stat. 218. These acts in essence confirmed the validity of existing vested appropriative water rights, provided for the acquisition of similar rights in the future, and vowed to protect such water right holders as long as their rights were acquired in accordance with local customs, laws, and court decisions. In construing these acts this court viewed the Acts as voluntary recognition by the federal government of the validity of appropriative water rights and the duty of the government to protect such rights. *Broder v. Natoma Water and Mining Co.*, 101 U.S. 274 (1879); *Atchison v. Peterson*, 87 U.S. 507 (1874). And, as recently as 1978, this Court has reconfirmed its recognition of the paramount nature of state water rights. *California v. United States*, 438 U.S. 635 (1978).

This system was finally adopted as state policy by a vote of the people in 1914.

Against this policy of encouraging appropriation came the decision of the California Supreme Court in *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81 (1926), in which the court held that the riparians, as against an appropriator, were entitled to the entire flow of the river even if the riparian use was unreasonable. Such a principle would have virtually destroyed the appropriation system. In response to *Herminghaus*, the California voters used the initiative process to adopt the 1928 Amendment to the Constitution (now California Constitution Article X, § 2), which has since served as the foundation for the water allocation system in the state. The people of the state thereby wholeheartedly confirmed the state's authority to grant appropriative water rights and preserved the appropriation system.

Illinois Central, which has served as the jumping-off point for many state courts in their pronouncements detailing public trust concepts, is being used by the California Supreme Court to thwart the will of the people as reflected in these two statewide votes. Public trust concepts have always been applied to protect the public from questionable and otherwise unreachable acts of legislators or administrators. J. Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.R. 473 (1970). It makes no sense to apply the doctrine to decisions voted on by the people as a whole, as in the 1914 Water Commission Act and 1928 California Constitutional Amendment votes. A careful review of the case

law demonstrates that the public trust doctrine has never before been applied to repeal or modify state constitutional or statutory provisions approved by statewide vote.

This egregious misinterpretation of *Illinois Central* and the resultant illogical and uncalled-for expansion of the scope of the public trust doctrine must be stopped now.

B. The Decision of the California Supreme Court Violates the Due Process Rights of the State's Citizens

As discussed in detail above, the citizens of California have twice voted to preserve California's appropriative water rights system. The first vote in 1914, adopted the statutory framework. This framework was almost destroyed by the 1926 *Herminghaus* decision. But the people of the state used the initiative process to override *Herminghaus* and to give constitutional status to the appropriation system.

Certainly the citizens of the state have some rights to self-government through the electoral process, especially in matters of paramount importance to the state and its citizens. Clearly, the allocation of a scarce water supply in a state where water is the lifeblood of the economy constitutes just such a matter of paramount state importance.

Voting is a fundamental political right because it is preservative of all rights. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The right of citizens to vote and express their will is the cornerstone of our democracy. The California Supreme Court has effectively disenfranchised the citizens of the state by the sudden and unpredictable application of public trust concepts to the state system of water allocation.

By so doing, the California Court has acted in an arbitrary and unreasonable manner to deprive the citizens of California of their fundamental right to vote on matters of paramount state concern. This gross abuse of the due process rights of the voters of California in violation of the Fourteenth Amendment to the United States Constitution demands a stinging rebuke from this Court.

II

SUBJECTING VESTED APPROPRIATIVE WATER RIGHTS TO RECONSIDERATION AND POSSIBLE REDUCTION WITHOUT COMPENSATION CONSTITUTES A TAKING IN VIOLATION OF THE FOURTEENTH AMENDMENT

ACWA adopts Argument III of Petitioner set forth at pages 23-27 of Petitioner's petition, but wishes to add to that argument the following.

The California Supreme Court clearly reduced the quantity, quality, and value of the property rights held by Petitioner and all other appropriative water right holders in the state. The vested and permanent nature of appropriative water rights has been attested to by numerous court decisions, legal treatises, and statutes. *Broder v. Natoma Water and Mining Co.*, 101 U.S. 174 (1879); *Thayer v. California Development Co.*, 164 Cal. 117, 125 (1912); *County of Amador v. The State Board of Equalization*, 240 Cal.App.2d 205, 213 (1966); 3 Farnham, *The Law of Waters and Water Rights*, 2090 (1904); Hutchins, *The California Law of Water Rights*, 40 (1956); California Water Code Sections 102, 109(a), 1201, 1240, 1241, 1429, and 1430.

Appropriative licenses have been the most secure water right obtainable in California. An appropriative license is properly characterized as a permanent easement subject to the condition that water be put to reasonable and beneficial use. Water Code Section 1675. Because an appropriator controls whether water is used reasonably and beneficially or not, the duration of the water right has been controlled by the water right holder.

The decision of the State Supreme Court has had a devastating impact on that control and has effectively reduced the scope and value of the property right held. Appropriative water right holders no longer control their own destiny. Continued application of water to reasonable and beneficial use and compliance with any additional license terms does not now guarantee the continued existence of their water rights. Now outside interests can continually challenge all appropriative water right holders and seek reduction of existing water rights.

This result is comparable to that involving real property, where a permanent easement holder is suddenly informed that he has only a revocable license. The obvious reduction in the quality and value of the permanent easement holder's property rights in this example is precisely what has happened to all appropriative water rights in California.

The California Supreme Court decision in this case clearly constitutes a sudden and unpredictable change in state law which undermines established rules of property law, defeats universally held expectations of inviolability, and takes valuable property rights for public purposes without compensation.

CONCLUSION

The California Supreme Court misinterpreted the public trust doctrine enunciated by this Court in *Illinois Central* and used the doctrine to undermine the will of the people of California as expressed in two statewide votes. By so doing, the California court not only incorrectly interpreted federal law, but also essentially disenfranchised the citizens of the entire state and effected a taking of the property of all appropriative water right holders in the state. If this decision is allowed to stand, the entire water rights system of the state will be disrupted, the will of the people thwarted, and uncertainty will replace the certainty that is essential to proper planning and efficient use of water resources.

ACWA hereby requests that a writ of certiorari issue from this court to review the questions raised and ultimately reverse the decision of the California Supreme Court, thus restoring appropriative water rights to their proper status as vested, permanent property rights.

DATED: September 19, 1983.

Respectfully submitted,

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No. 83-300
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Petitioner,

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Respondents.

BRIEF OF AMICI CURIAE STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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Question Presented.

Although the decision below dealt with other uses, this brief is limited to the following question:

Whether the California Supreme Court's decision subjecting vested appropriative water rights to revocation based on vague "public trust" criteria is a deprivation of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

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BRIEF OF AMICI CURIAE STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Interest of Amici.

Water is a scarce resource in the arid West. Early American cartographers often referred to the region as the "Great American Desert." Even including the relatively water-rich coastal states, states west of the 100th meridian receive on average one-fourth the available rainfall in the East.

This scarcity has led the western states to establish intricate systems to allocate available water supplies. These systems are based upon principles of prior appropriation which protect vested water rights as against subsequent water

users. Many years of experience in settling and developing a locale where sources of water are often located long distances from areas of need have both reaffirmed the need for and refined the operation of the prior appropriation doctrine as the controlling standard of water law in the West.

Recognizing the applicability of the laws and customs which were being developed in the West to manage water resources, Congress, by passage of the Mining Act of 1866, 14 Stat. 262 (1866), 43 U.S.C. § 661 (1970), and the Desert Land Act of 1877, 19 Stat. 377 (1877), as amended 43 U.S.C. § 322 (1970), approved past and future appropriations of water on public lands which had been made pursuant to local procedures. This Court later recognized the Desert Land Act as having severed the land and water estates in the public domain, directing that rights to water be established pursuant to state law and independently of rights to land. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). Even before the *Beaver Portland Cement Co.* decision this Court recognized that local appropriation rights were "rights which the government had, by its conduct, recognized and encouraged and was bound to protect." *Broder v. Natoma Water and Min. Co.*, 101 U.S. 274, 276 (1880). In various recent decisions this Court has reaffirmed the importance of the doctrine of prior appropriation and the validity and security of the water rights created thereunder. *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978); *Arizona v. California*, ... U.S. ...., 103 S.Ct. 1382 (1983); *Arizona v. San Carlos Apache Tribe*, ... U.S. ...., 103 S.Ct. 3201 (1983); *Nevada v. United States*, ... U.S. ...., 103 S.Ct. 2906 (1983). In *Arizona v. California* this Court stated, "The doctrine of prior appropriation . . . is itself largely a product of the compelling need for certainty in the holding and use of water rights." 103 S.Ct.

This Congressional and judicial deference to and approval of western water law is appropriate since it is the stability and predictability of such law which has, in large part, made the West a socially inhabitable and economically fruitful region. The "first in time — first in right" rule of the appropriation doctrine protects existing economies which are predicated upon established uses while at the same time insuring maximum beneficial water use as defined by the public. The need for certainty led state systems to provide that competing water demands and public interest concerns be weighed *before* a water right is issued. The result is the time honored expectation that once perfected, appropriative water rights are permanently vested property interests which can only be revoked by abandonment or forfeiture. Thus the California Supreme Court's decision below is unprecedented in holding that the "public trust" doctrine provides a basis for revocation of state created water rights.

This decision could create chaos in the water right system in California. Additionally the reasoning of the court's decision could have ramifications in other states. Many conflicts exist west-wide between those who rely on off-stream diversionary water rights and those who support increased in-source use. If there indeed exists a common law "public trust" doctrine by which vested appropriative water rights may be suddenly revoked, then the foundation of the water management and allocation systems relied upon west-wide has been severely and detrimentally undermined.

If the California Supreme Court's decision is followed, it would mean that numerous state water right holders in the West would be faced with the possibility that the diversions on which they have relied to support their farms, orchards, businesses, and communities would be subject to revocation at any time based on vague "public trust" criteria which did not even exist at the time their diversions were

initiated. Additionally, based on the rationale that the appropriations were always contrary to the "public trust," it could follow that the taking of the rights for reapplication to "trust" uses would not be compensable. Because of these potentially serious adverse consequences of the California Supreme Court's decision, the *amici* urge this Court to grant the writ of certiorari sought by the City of Los Angeles Department of Water and Power.

REASONS FOR GRANTING THE WRIT.

BY APPLYING THE SO-CALLED "PUBLIC TRUST" DOCTRINE TO HOLD THAT VESTED APPROPRIATIVE WATER RIGHTS IN CALIFORNIA ARE REVOCABLE ON "PUBLIC TRUST" GROUNDS THE CALIFORNIA SUPREME COURT HAS DENIED THE CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

A. Vested Appropriative Water Rights Are Constitutionally Protected Property Interests.

The constitutions and statutes of the western states expressly encourage the fullest possible use of water for beneficial purposes and assure permanency and stability of appropriative water rights. Usually, such rights are established first as conditional rights, which allows time for construction of storage or diversion works necessary for water use. After such facilities are completed, and water is diverted through them, a water right is issued which is valid as long as the appropriator continues to put to beneficial use the water to which the right pertains and complies with any conditions in the right.

One of the important principles of the appropriation doctrine is that public interest criteria are considered and weighed before water rights are granted. The California Water Code gives the Water Board abundant authority for this purpose *See, e.g.* California Water Code §§ 1243, 1243.5, 1253 and 1255. The same is true in other western states. Wells A. Hutchins, a recognized expert on Western water law, has written, "Nearly all the 16 appropriation-permit statutes contain specific provisions relating to the handling of prospective appropriations that threaten to prove detrimental to the public interest or public welfare." 1 Hutchins, *Water Rights Laws in the Nineteen Western States*, p. 409 (1971). Harm to the public interest can result in denial of an ap-

plication for a vested water right or issuance of a right with conditions designed to ameliorate the effect on the public interest. Of critical importance in the instant action is that the California Water Board had ample authority under California water law (under provisions now codified as California Water Code Sections 1253 and 1255) to weigh public interest values before granting vested water rights to the Los Angeles Department of Water and Power (hereafter DWP).

A fundamental attribute of the appropriation doctrine is that, once vested, appropriative water rights are constitutionally protected property interests. An early authority on water law commented:

> A water right, acquired under the arid region doctrine of appropriation, may be defined as the exclusive, independent property right to the use of water appropriated according to law from any natural stream, . . . the right continues only so long as the waters are actually applied to some beneficial use or purpose; . . .

2 Kinney, *Irrigation and Water Rights*, pp. 1313-1314 (2d ed., 1912). In an exhaustive National Water Commission study the following statement is made:

> . . . appropriation water rights are said to be usufructary, or rights to take possession of the water and use it, as distinguished from property ownership of the corpus of the water. However, these rights are in the nature of property rights which are entitled to constitutional protection against impairment without due process of law . . .

Dewsnup & Jensen, *A Summary-Digest of State Water Laws*, p. 32 (1973) Under the heading "Right of Private Property", Wells A. Hutchins stated:

> *The appropriative right is a species of property* — at the beginning of the development of water law in Cal-

> ifornia — in the earliest years of statehood — it was established that the right which an appropriator gains is a private property right, subject to ownership and disposition by him as in the case of other kinds of private property (*Thayer v. California Development Co.*, 128 Pac. 21 (1912); (and other citations))
>
> This view of the property nature of the appropriative right has been consistently taken by the western courts that have had occasion to pass upon or to discuss it (Citations include court opinions from Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Texas, Utah and Wyoming)
>
> *Valuable property* — Not only is the appropriative right property — it is valuable property. In an early case, it was termed "a substantive and valuable property." In a recent one, "a property right of high order." (citations omitted)

1 Hutchins, *Water Right Laws of the Nineteen Western States*, pp. 151, 2 (1971) (emphasis in original)

The decision of the California Supreme Court below, holding that a vested appropriative water right may be revoked based on a determination that it is not in conformity with "public trust" values is unique. The court's result erroneously transforms the DWP water rights into temporary, revocable licenses rather than recognizing them as vested, property interests subject to divestiture only pursuant to clearly established rules of state water law. This characterization runs contrary to all applicable precedent and established law.

B. The California Supreme Court's Ruling Affected a Taking of DWP's Protected Property Interests.

Through various references in its opinion the court below acknowledged but rejected the contention that the result it reached was precluded by the vested nature of DWP's water

rights. (*See* Pet. App. 4, 29, 38, 43) The Court even went so far as to describe its actions as an attempt "to clear away the legal barriers which have so far prevented either the Water Board or the courts from taking a new and objective look at the water resources of the Mono Basin." Pet. App. 51. By law the Water Board took an "objective look" at the Mono Basin and its water supplies before granting DWP vested rights to water in that Basin. More importantly, one of the "legal barriers" the California Supreme Court may not "clear away" to provide for reconsideration of those rights is the Fourteenth Amendment of the United States Constitution, specifically the due process of law guaranteed therein.

In the following listed decisions this Court has described the point at which the change in status of title to property through the ruling of a state court rises to the level of an unconstitutional taking. In *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 146, 164 (1916) this Court stated that if the ruling "is so certainly unfounded that it may properly be regarded as essentially arbitrary" then a taking has occurred. In *Fox River Paper Co. v. Railroad Comm. of Wisc.*, 274 U.S. 651, 656 (1927) the test was articulated as whether the ruling presents a "novel view" inconsistent with earlier state court decisions. In *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 543 (1929) the test was described as whether the ruling so departs from established principles as to be without substantial basis. And, in *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944) this Court stated that if a state court ruling "fails to rest upon a substantial basis" property has been taken.

Application of any of these definitions of a taking by a state court leads to the conclusion that the decision below affected an unconstitutional deprivation of property and is

ripe for review by this Court at this time. The decision is arbitrary in that it seeks, at the expense of all reasonable expectations, to "clear away the legal barriers" (including established precedent) which prevent the taking of the DWP water rights. It is novel in that it departs from established principles to the extent that it is unique among appropriation doctrine cases. And it fails to rest upon a substantial basis and in fact is predicated on a principle foreign to appropriative water law.

Essentially, the holding transforms a vested property interest into a revocable license to use. Thus, DWP's vested title is downgraded to a defeasible title. This divestment of title is a taking of property. *See Abbleby v. Delaney*, 271 U.S. 403 (1926); *State of Indiana ex rel Anderson v. Brand*, 303 U.S. 95 (1938); *Wood v. Lovett*, 313 U.S. 362 (1941). Regarding the ripeness for review of the instant case this Court's recent decision in *Nevada v. United States*, ... U.S. ...., 103 S.Ct. 2906 (1983) is instructive. No actual reduction of water rights had yet been effectuated in that case. However, loss of the res judicata defense, portending *potential* future diminishment of vested appropriative water rights, was considered worthy of immediate review by this Court.

The decision below goes beyond DWP's water rights and subjects *every* water right in California to perpetual contestability on "public trust" grounds. This is contrary not only to California's historical protection of perfected appropriative water rights as vested property interests, but also to the law of the other appropriation states. (See A above). The theory, utilized by the court rested on a misconstruction of this Court's ruling in *Illinois Central Railway Co. v. State of Illinois*, 146 U.S. 387 (1892). The court reasoned that the DWP water rights have always been subject to the "public trust", their reapplication to "trust" uses, there-

fore, apparently does not require purchase or condemnation. The end result is that the court has transformed DWP's vested property right into a defeasible interest constituting a taking of property for which no compensation is to be paid. The due process clause of the Fourteenth Amendment forbids such confiscation.

C. The Taking of DWP's Vested Property Rights Is Contrary to the Interests of Sound Public Policy.

Determinations as to the use of water in the West involve a delicate and complex balancing of benefits and costs associated with each competing use of water and area of use. These decisions have a significant effect on the development of the state, as they shape the priorities for water uses between the state farmers, cities and industries, and between these uses and competing environmental uses. In carrying out these responsibilities, states have developed the statutory and administrative mechanisms to allow full consideration of the public interest, including information regarding competing uses.

California water law provides extensive protection for public interest values. California has delegated to its Water Board the responsibility to see that public interest criteria are met when water rights are granted. This was done pursuant to state statutes and the state constitution. In the present case the Water Board, carrying out its statutory obligations, had the legal responsibility to consider public interest values before granting DWP vested water rights.

In challenging these rights, the plaintiff's below could have alleged that the diversions or uses of water were unreasonable or non-beneficial. Although incorrect, such claims would have had a basis in California water law. (*See* California Constitution Article X, Section 2.) Instead the plaintiff's primary contention was that the DWP rights were out

of harmony with the "public trust." The California Supreme Court was convinced by the plaintiff's contentions. The effect of the court's decision is to place a vague common law doctrine in a controlling position over an intricate state statutory scheme *and* specific state constitutional language. Although the "public trust" has been used to invalidate questionable legislative acts (*i.e.* the Illinois legislature's grant of nearly the entire outer Chicago harbor to a railroad company — *Illinois Centray Railway Co. v. Illinois*, 146 U.S. 387 (1982)) never has the purpose of the "trust" been to invalidate the express will of the people as manifest in specific constitutional language. Clearly, this Court never intended such a result when it decided *Illinois Central*. The California court would have a common law "public trust" doctrine supercede state constitutional and statutory provisions. If this approach were indeed correct, then no water right in the West would be truly vested or ever become so. Rather, every holder of water rights, even rights for highest priority municipal needs, would be plagued by questions of when and for what expanded "public trust" uses such rights could be revoked.

Sound public policy argues against such a result. The West has been developed on the expectation that appropriative water rights are valuable and permanent property interests. The system which has been developed to grant those rights provides a process to protect public interest values. It is now too late to be reconsidering every right previously granted for compliance with the ever changing "public trust." This is especially true when such reconsideration may lead to the taking of vested property rights without compensation.

Conclusion.

The States of Idaho and Wyoming joined herein as *amici* assert that the decision below of the California Supreme Court effectuates an unconstitutional taking of property in

violation of the Fourteenth Amendment of the Constitution of the United States. The possible unsettling ramifications of the decision are of further concern. For these reasons and those described above the *amici* respectfully urge this Court to grant Los Angeles' petition for writ of *certiorari*.

Respectfully submitted,

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INTRODUCTION.

The Department of Water and Power of the City of Los Angeles filed a Petition with this Court on August 22, 1983, for a writ of certiorari to the California Supreme Court. By its petition, the City seeks this Court's review of federal questions raised in the California Supreme Court's February 17, 1983 decision in *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (modified at 33 Cal.3d 726a). In that

decision, the California Court extended the common law public trust doctrine in a manner that conflicts with applicable decisions of the Court, as indicated in Rule 17.1(c). Furthermore, that extension impairs water rights that Los Angeles has perfected under California water law, by allowing future reallocation of those rights to other uses, in violation of the Fourteenth Amendment of the Federal Constitution. The California Court's decision also authorizes similar reallocation on a continuing basis, of all water rights under which California's communities have developed vital public water supplies.

The California Court acted in response to respondents' request to circumvent a comprehensive statutory program for allocating water rights for public water supplies (Petition, page 5; Appendix to Petition Pages A-34 to A-37). Respondents sought that circumvention in order to establish a legal basis for reallocating use of fresh water from streams in Mono Basin, away from domestic and other municipal purposes within the City of Los Angeles. Respondents seek to reduce or eliminate the use of that water for those purposes, so that it would, instead, flow into Mono Lake, which is a natural salt sink located in an arid, unpopulated, area approximately 150 miles northwest of Death Valley (Petition, pages 3, 5). By flowing into the Lake, the water would become highly salinized and thus unsuitable for use as a public water supply.

In extending the public trust doctrine as respondents requested, the California Court has established the controlling law for the remaining proceedings, and, in fact, for other pending California actions, on the basis of an improper application of the decision of this Court in *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387, so as to violate the property protections of the Fourteenth Amendment of the Federal Constitution.

INTEREST OF AMICUS.

Amicus, The Metropolitan Water District of Southern California (Metropolitan), has a vital interest in this proceeding beyond that of Petitioner in two major respects. First, the Petitioner, the City of Los Angeles, lies within Metropolitan's service area so that any reduction of its Mono Basin water supply will impose additional water supply burdens on Metropolitan. Secondly, the California Supreme Court's extension of the public trust doctrine also circumvents vested water rights and California water rights programs on which Metropolitan relies for much of its water supply.

I.
Water Service Responsibility.

Metropolitan has responsibility for providing imported water supplies to a large semi-arid portion of California which includes the City of Los Angeles and contains over half of California's people and much of its commercial and economic activity.[1] Los Angeles is one of Metropolitan's 27 member public agencies, and accordingly has rights to purchase imported water from Metropolitan.[2]

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[1]Metropolitan is a public agency formed in 1928 under the Metropolitan Water District Act, a general law of the State of California, originally enacted by the State Legislature in 1927 (Chapter 429 of the Statutes of 1927; *City of Pasadena v. Chamberlain* (1928) 204 Cal. 653). The Act was subsequently amended from time to time until it was reenacted as Stats. 1969, Chapter 209. Further amendments have been made to the 1969 Act.

Metropolitan initially comprised 11 cities, including the City of Los Angeles, which joined together for the development of an imported domestic water supply to supplement their own resources. Metropolitan now consists of 14 cities, 12 municipal water districts, and one county water authority in six counties within Southern California. Metropolitan's service boundaries consequently cover an area of approximately 5200 square miles and include a population of over 12 million people and 133 cities.

[2]Under the Metropolitan Water District Act, Los Angeles has preferential rights to purchase water from Metropolitan (Metropolitan Water District Act, §135).

Consequently, any reduction in Los Angeles' Mono Basin water supply will impose additional water supply burdens on *Amicus*. That burden is particularly important because of limitations on Metropolitan's own water supplies and increasing water demands in other population centers within Metropolitan's service area. Like Los Angeles, these communities have long outgrown their local water supplies and thus, along with Los Angeles, depend on Metropolitan's importation of public water supplies.

Water importations into Metropolitan's service area currently total about two million acre feet annually and provide about two-thirds of the area's water supply. The importations arrive through three separate aqueducts: (1) the Los Angeles Aqueduct, which delivers water diverted from the Owens Valley and the Mono Basin of the Eastern Sierras under Los Angeles' water rights, for use in that city; (2) Metropolitan's Colorado River Aqueduct, which delivers water from the Colorado River under a Boulder Canyon Project Act contract with the United States (*Arizona v. California* (1963) 373 U.S. 546, 562, 586-590; (1983) ___ U.S. ___; 75 L.Ed.2d 318, 326); and (3) the State Water Project's California Aqueduct, which delivers water from the Western Sierras, under Metropolitan's contract with the State of California (*California v. Sierra Club* (1981) 451 U.S. 287, 291 n. 4; *Metropolitan Water District v. Marquardt* (1963) 59 Cal.2d 159). Metropolitan, in turn, delivers the water imported through the latter two aqueducts to its member agencies, including Los Angeles, pursuant to the Metropolitan Water District Act (Deerings' California Water Code Uncodified Acts, Act No. 9129(b)).

These importation programs are therefore highly interrelated. Thus, in 1964, Metropolitan amended its contract with the State of California to increase its entitlement to State Project water because of a projected decrease of at

least 662,000 acre feet in its annual Colorado River water supply as a result of this Court's limitation of California entitlements, in *Arizona v. California, supra*, 373 U.S. at 583. (See also implementing Decree, 376 U.S. 340, 342, 347.)

In particular, Metropolitan's supply is closely interrelated with Los Angeles' imports since Los Angeles can purchase water from Metropolitan to make up deficiencies in its own imports. Consequently, reduction of Los Angeles' Mono Basin water supply will increase that City's need to purchase imported water from Metropolitan and will thus increase Metropolitan's importation requirements. That, in turn, will require importation of more water from California's State Water Project since, as indicated above, this Court has limited Metropolitan's Colorado River supply.

However, the State has so far developed only half of the State Water Project (SWP) water supply required under its water service contracts with Metropolitan and other public agencies throughout California. Thus, the California Court's decision that Los Angeles' Mono Basin water rights are permanently subject to reduction or termination creates a definite potential for restricting both existing and future SWP water rights. That restriction would in turn seriously impair Metropolitan's water supply[3] and force it to limit water deliveries to all of its member agencies.

II.
State Project Water Supply.

Metropolitan has an additional interest in a review of the California Supreme Court's decision because other entities have already invoked that decision as a basis for reducing

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[3]SWP water currently provides about half of Metropolitan's water supply, but will increase to over 70% within the next few years, as Arizona's Central Arizona Project becomes operational.

the existing water supply of California's State Water Project[4] in pending litigation before both federal and state courts. Impairment of the SWP water supply would impose serious water supply deficiencies on all of Metropolitan's member agencies, in addition to limiting Metropolitan's ability to replace any loss of Los Angeles' Mono Basin water supply.

The SWP water supply depends on water diversions from the Sacramento-San Joaquin Delta in Central California, by California's Department of Water Resources (DWR), the state agency which operates the SWP. (*California v. Sierra Club, supra*, 451 U.S. at 290; *Metropolitan Water District v. Marquardt, supra*, 59 Cal.2d at 176, 177.) The water rights which authorize those diversions are currently being litigated, with a trial court judgment expected early next year.[5]

Parties challenging SWP water rights in that litigation have already alleged as an additional basis for reducing those

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[4]The SWP consists of a series of water storage and transportation facilities to transfer surplus northern California water to the Sacramento Valley, the San Francisco Bay area, the San Joaquin Valley, and Southern California. (*California v. Sierra Club, supra*, 451 U.S. at 290, 291; *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 904, hearing denied July 14, 1983.)

[5]California's State Water Resources Control Board (SWRCB) authorized the diversions by issuing water rights permits to DWR subject to continuing jurisdiction. (*United States v. California* (U.S. D.C., E.D. Calif. 1981) 529 F.Supp. 303, 305.) In 1978, after extensive hearings, the SWRCB modified those permits to improve salinity protection for local Delta waters, along with similar permits issued to the United States for the analogous federal Central Valley Project (CVP). (*Id.*) That modification has generated extensive litigation in the state courts in which Metropolitan is a party, consisting of 14 mandate petitions. California's Judicial Council has coordinated all 14 actions in one proceeding designated *Delta Water Cases*, Coordination Proceeding No. 548, which is pending before the San Francisco Superior Court. (529 F.Supp. at 306.)

Southern Delta interests have also filed an action in the Federal District Court for the Eastern District of California last year challenging SWP and CVP water rights. (*South Delta Water Agency, et al. v. United States, et al.*, Civil No. S 82-567 MLS.)

rights, the California Supreme Court's public trust decision that is the subject of this proceeding. Consequently, Metropolitan is concerned that other courts will use that decision as a basis for circumventing vital SWP water rights on which Metropolitan and scores of communities within its service area rely. Furthermore, we are concerned that those courts will apply that decision under a *stare decisis* mandate which precludes any opportunity to challenge the decisions resolution of the underlying federal questions. This new threat to existing SWP water supplies places Metropolitan in a precarious position to meet its obligations to provide water needed by communities in which half of California's people live and work.

SUMMARY OF ARGUMENT.

Amicus agrees that Petitioner held vested property rights to use Mono Basin water prior to the California Court's decision; and that that decision unconstitutionally deprives Petitioner of those rights by erroneous application of the decisions of this Court. However, since *Amicus* has particular awareness of the need for prompt review, this brief will limit its argument to the issue that the California Supreme Court's decision is ripe for review at this time, rather than rearticulate the arguments on those issues already presented in the Petition.

There are compelling reasons for review at this step of the proceedings because the California Court's decision is now being implemented as final in other matters of wide public importance. Under California law, the decision is now jurisdictionally final so that there is no present opportunity for further consideration by the California courts, of the decision's subordination of vested water rights to its new open-ended public trust concepts. Failure to review the decision now will create a cloud of uncertainty over all Cal-

ifornia water rights. That uncertainty consists not only of the ambiguities inherent in the decision itself, but also uncertainty over this Court's determination of the underlying federal questions on which the decision relies.

Furthermore, the decision creates that uncertainty at a time of increasing concern over the availability of secure and safe community water supplies and at a time of critical water rights litigation over State Water Project supplies. Delaying review of the decision will exacerbate that litigation by requiring use of the public trust extension as a new basis for reallocating those supplies before resolution of the underlying federal questions. Delay will also create substantial risk of inefficient use of judicial resources since reversal of the decision after completion of the subsequent Mono Basin proceedings, will require modification of intervening State judgments and probably relitigation of their water rights issues. Delay in reviewing the California Court's decision until after completion of the subsequent Mono Basin water rights proceedings will therefore impose unnecessary burdens on non-parties such as *Amicus*.

ARGUMENT.

I.
SPECIAL AND IMPORTANT REASONS REQUIRE REVIEW AT THIS TIME.

Review of the California Court's decision is particularly appropriate at this time because of the special and important nature of its extension of federal public trust concepts. It resolves a basic water rights issue of first impression that applies well beyond the Mono Basin factual situation. Accordingly, it directly impacts other pending water rights litigation, as well as all of the state's present and future administrative water rights and water planning functions.

In short, the decision opens a Pandora's Box that threatens relitigation of all other water supplies. Indeed, it has already been invoked in other pending water rights litigation that is currently challenging water supplies of transcendent statewide importance. Thus, delaying review of the decision until completion of the remaining Mono Basin proceedings will significantly increase the difficulty and expense of implementing a reversal of the decision upon completion of the subsequent Mono Basin proceedings.

A. General Public Importance.

The California Court's decision specifically recognizes the widespread importance of its resolution of the public trust issue. Indeed, early in its decision, the California Supreme Court states that it bypassed the normal intermediate appellate level and took the case directly from the trial court, "in view of the importance of the issues presented". (Appendix to Petition, page A-3.) It then describes the public trust issue in sweeping terms that leave no doubt of its widespread impact on California water rights generally:

> "*This case brings together for the first time two systems of legal thought: The appropriative water rights system*

which since the days of the gold rush has dominated California water law, *and the public trust doctrine* which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values [cite], *the two systems of legal thought have been on a collision course*. [cite] They meet in a unique and dramatic setting which highlights the clash of values. . . ." (*Id.*, emphasis added)

Compounding that importance is California's enormous dependence upon the allocation of fresh water supplies, particularly in light of increasing prospects for water supply shortages. The Governor's Commission to Review California Water Rights Law has succinctly described the pervasiveness of that dependence in light of California's most recent drought:

"Drought succeeds like nothing else in *reminding Californians of their enormous dependence upon water*. Irrigated agriculture, many industries, hydroelectric power generation, water-related recreation, fish and wildlife resources, and many aspects of our home life continue and *prosper only if adequate supplies of fresh water are available*. The recent drought demonstrates the potential frailty of that prosperity.

"During the 1976-77 drought year, water shortages forced the State Water Project to impose fifty percent deficiencies on agricultural deliveries. The U.S. Bureau of Reclamation was forced to reduce deliveries by seventy-five percent for agricultural use and by fifty percent for municipal and industrial use. While precipitation during the 1977-78 year has dramatically improved the short-term water conditions of the State, *long-term prospects remain bleak*. By the year 2000 the state's *net demand for water may considerably ex-*

> *ceed net dependable supply. Clearly, continuous attention to the allocation of water and to water rights law, as well as to expanding the supply of water available for beneficial use, will be necessary.*" (Final Report of Commission (December 1978), page 1.)

This court has also recognized the importance of California water rights allocations:

> "It is probable that *no problem of the Southwest section of the Nation is more critical* than that of scarcity of water. As southwestern populations have grown, conflicting claims to this scarce resource have increased. To meet these claims, several Southwestern States have established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource." (*Colorado River Water Cons. District v. United States* (1976) 424 U.S. 800, 804; emphasis added; footnote omitted.)

The omitted footnote specifically refers to California's codified water rights appropriation laws. (424 U.S. at 804, n. 2.)

B. Hardship on Non-Parties if Review Is Delayed.

Delaying review of the California Court's decision until after completion of all the subsequent Mono Basin proceedings will impose important hardships on *Amicus* and other non-parties. That hardship consists of uncertainty over the availability of basic public water supplies and over the validity of rights. The latter burden arises because of the decision's status as final California water law and its resulting invocation by parties in other pending water rights cases which affect vital water supplies, particularly those of California's State Water Project.

1. Water Supply Uncertainty.

Deferral of review compounds uncertainty over the future availability of public water supplies that until now had been considered assured because of their underlying water rights.

While the decision's subordination of water rights to permanent reallocation under public trust theories generates an inherent uncertainty,[6] failure to validate the federal issues that support that subordination exacerbates the uncertainty. All subsequent California water rights determinations, judicial or administrative, will remain suspect and uncertain until this Court rules on the validity of the federal questions on which the California Court's decision bases its extension of the public trust.

The resulting uncertainty has pernicious effects on the water supplies on which California's people and economy rely. It fosters recurrent, costly and piecemeal litigation and impairs the state's administration of water rights (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 355-357.) This Court reviewed the importance of certainty of water rights just this past term, stating:

> "*Certainty of rights is particularly important with respect to water rights in the Western United States.* The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. [cite] *The doctrine of prior appropriation, the prevailing law in the western states, is itself largely a product of the compelling need for certainty in the holding and use of water rights.*" (*Arizona v. California* (1983) ___ U.S. ___, 75 L.Ed.2d 318, 334; emphasis added.)

In a supporting note, this Court went on to observe that:

> "Prior appropriation law serves western interests by encouraging the diversion of water for irrigating otherwise barren lands and for other productive uses, and

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[6]See, *e.g.*,

"The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust." (Appendix to Petition, page A-42, footnote omitted.)

> *by insuring developers that they will continue to enjoy use of the water.* 'Appropriation law, developed in the arid West, is usually thought of as a system for water-short areas. Where there is not enough for everyone, *the rule of priority insures that those who obtain rights will not have their water taken by others who start later.*' F. Trelease, Cases and Materials on Water Law 11 (1979)" (75 L.Ed.2d at 334, n. 11, emphasis added.)

This Court then implemented its recognition of the importance of water rights certainty, by rejecting a special master's proposed water rights allocation, with the comment that:

> "It would be counter to the interests of all parties to this case to open what may become a Pandora's Box, upsetting the certainty of all aspects of the Decree." (*Id.*, 75 L.Ed.2d at 337.)

2. Water Rights Litigation Burden.

The California Court's decision has cracked open the Pandora's Box of water rights uncertainty. Delay in reviewing the federal questions on which it relies will open it wide. California's courts and administrative agencies have other water rights allocation proceedings of major importance already before them for decision. They will undoubtedly act on some of those proceedings well before completion of subsequent proceedings in this case. Thus, delaying review until then will present this Court with legal questions which may have already been implemented in other proceedings, without federal review. Furthermore, implementing a reversal of the California Supreme Court's decision at that time will be much more difficult, because it will require rectifying, and probably relitigating, the intervening water rights allocation decisions.

As noted above, several cases are now pending in state and federal California courts challenging water rights issued

to California's State Water Project. Parties in those cases have already invoked the California Supreme Court's public trust doctrine as a basis for reducing the SWP water rights.[7]

Furthermore, California's State Water Resources Control Board continuously determines water rights allocations under its water rights administration responsibilities. (Appendix to Petition, page A-37.) It must apply the new public trust decision to those proceedings, which currently include a proceeding to determine whether to modify several hundred water rights permits for the Sacramento-San Joaquin River System.[8] Parties to that proceeding have also invoked the public trust doctrine.[9]

Obviously, these pending water rights allocation proceedings will incorporate in their determinations the Cali-

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[7]Note 4, above, describes that litigation in more detail. Recent pleadings in those cases, that assert the California Court's public trust decision include:

a. San Francisco Superior Court; *Delta Water Cases*, Judicial Council Coordination Proceeding No. 548:
   i. Joint Opening Brief of Petitioners Contra Costa County Water Agency, San Joaquin County Flood Control and Water Conservation District and Central Delta Water Agency, et al. on Key Legal Issues (June 15, 1983) pages 5, 105, 106, 109;
   ii. Opening Brief of Petitioners South Delta Water Agency, et al. on Key Legal Issues (June 10, 1983) pages 20, 21, 31;
   iii. Respondents' Memorandum of Points and Authorities on Key Legal Issues (September 8, 1982), pages 91-95, 125, 143-146.
b. United States District Court for the Eastern District of California; *South Delta Water Agency, et al. v. United States, et al.*, Civil No. S 82-567 MLS,
   i. Points and Authorities in Support of [Plaintiffs'] Motion for Preliminary Injunction (May 11, 1983) pages 5, 9;
   ii. Reply Memorandum of Plaintiffs' in Support of Motion for Preliminary Injunction (June 22, 1983) pages 6, 7.

[8]"Determination of the Season of Diversion for Sacramento-San Joaquin Delta Watershed [water right] Permits With Continuing Jurisdiction (Term 80)".

[9]Brief of the Environmental Defense Fund and Save San Francisco Bay Association (May 27, 1983), pages 9-12; Post Hearing Brief of the Department of Water Resources (May 27, 1983).

fornia Supreme Court's public trust decision, before completion of the subsequent proceedings to quantify the impact of the public trust decision on Mono Basin.

II.
THE CALIFORNIA COURT'S DECISION IS EFFECTIVELY FINAL.

Although the California Court's decision involves subsequent proceedings to determine Mono Basin factual issues, it has final *stare decisis* effect and has thus established binding state water rights law. The decision also effectively controls the subsequent Mono Basin proceedings by removing any legal issue of taking, and by imposing continuing authority to reallocate petitioner's water rights even if petitioner prevails in those proceedings. Accordingly, review of the decision now would satisfy the type of non-mechanical determination of finality jurisdiction contemplated by this Court in *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 477.

A. The Decision Has Final Effect Under California Law.

The decisions of California's Supreme Court are binding upon and must be followed by all the state's courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 58 Cal.2d 450, 455.) Consequently, the California Court's imposition of a new public trust limitation on vested water rights jurisdictionally controls all existing and prospective water rights allocation proceedings. (*Frink v. Prod* (1982) 31 Cal.3d 166, 170.) Under California law, therefore, all water rights in California have become subject to reallocation by California's courts and administrative agencies, independently of the outcome of the subsequent Mono Basin proceedings. (Appendix to Petition, pages A-39, 41, 42.)

Although the decision observed that it was but one step in the eventual resolution of the specific Mono Lake con-

troversy (Appendix to Petition, page A-51), it also manifested a clear intention to impose new state water reallocation authority on all water rights forthwith:

> "The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; *it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.* (Appendix to Petition, page A-39; footnote omitted; emphasis added.)
>
> "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, *the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.*
>
> "The state accordingly has the *power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.*" (*Id.*, pages A-41, 42; footnote omitted; emphasis added.)

Certainly, the California Court considered that its extension of public trust authority to reallocate prior water rights was final and binding on the courts and administrative agencies that are involved in planning and allocating California's water resources.

B. The Decision Controls the Subsequent Proceedings.

In a very real sense, the California Court's decision controls the subsequent proceedings in this litigation. Indeed, there would be no subsequent proceedings had the California

Court affirmed the trial court's ruling that the public trust doctrine is subsumed in California's water rights system. (Appendix to Petition, pages A-3.)

In addition, the decision removes any legal question of compensation from those proceedings. It clearly indicates that the imposition of the new public trust limitation on water rights does not constitute a taking of property for which compensation would be required:

> ". . . By implication, however, the determination that the property was subject to the trust, despite its implication as to future uses and improvements, was not considered a taking requiring compensation." (Appendix to Petition, page A-29, n. 22.)
>
> "In summary, the foregoing cases amply demonstrate the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust [cite]." (Appendix to Petition, page A-29.)
>
> ". . . In exercising its sovereign power to allocate water resources in the public trust, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." (*Id.*, page A-41.)

Consequently, the decision limits the subsequent Mono Basin proceedings to a factual determination of whether and to what degree Petitioner's water rights will be reallocated at this time. Those proceedings will not include any issue of taking; nor will they address the impact on petitioner of the continuing state authority to reallocate Petitioner's water rights after those proceedings end.

This proceeding thus differs importantly from the somewhat analogous situation in *San Diego Gas and Electric Co. v. San Diego* (1981) 450 U.S. 621, where this Court

rejected review by a narrow 5-4 margin. There, the California Court had not decided, as it has here, whether any taking had occurred or could occur. (450 U.S. at 636.) Furthermore, the procedural history of that case differs importantly from that of the pending case. In *San Diego Gas and Electric*, the property owner initiated the litigation to test the exercise of delegated police powers over property it intended to develop in the future. Indeed, the property owner had not in fact requested the City's approval for that development. (450 U.S. at 626.)

On the other hand, third parties initiated this action to preempt operating property rights that the regulating governmental entity (the State Water Resources Control Board) had already granted Petitioner. Petitioner had moreover been using that right to provide vital public water supplies for many years. (Petition, pages 3-5, 14-17.) In addition, this proceeding seeks review of a decision that imposes new judicial limitations based on a California Court's extension of decisions of this Court (Petition, pages 18-23), rather than on the California Court's interpretation of the exercise of police powers delegated by the California Legislature. Consequently this case presents a much more immediate and confiscatory challenge to vested property rights than did *San Diego Gas and Electric*, independently of its widespread public importance described above in Section I.

Conclusion.

Amicus respectfully urges this Court to approve Los Angeles' Petition to review the California Supreme Court's decision in *National Audubon Society v. Superior Court*. We urge that review because the decision seriously impairs federally protected rights on which millions of people rely for basic water supplies; and because it bases that impairment on erroneous interpretations of the decisions of this

Court. We further urge that review not be deferred until completion of the subsequent Mono Basin proceedings because the California Court's decision constitutes a jurisdictionally final statement of California law that now controls pending proceedings that affect much of California's water supply; and because delay will create additional uncertainty in the administration of vital public water supplies, as well as the probability of unproductive use of judicial resources.

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Respectfully submitted,

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